THE AYODHYA REFERENCE

Supreme Court Judgement and Commentaries

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KOENRAAD ELST
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VOICE OF INDIA
New Delhi

ISBN 81-85990-30-1

© AUTHORS

First Published: 1995

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Published by Voice of India, 2/18, Ansari Road, New Delhi - 110 002
Printed at Crescent Printing Works Pvt. Ltd., P-14, Connaught Circus,
New Delhi - 110 002

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Introduction

> "It is very desirable that a suit of this kind is decided as soon as possible, and it is regretted that it remains undecided after four years. The delay appears to be principally due to the fact that the record of the proceedings in the trial court was summoned by this court in the year 1953 on the application of the present appellants. Had that not been done, the suit would probably by now have been decided.
>
> "... We, however, consider it extremely desirable that the suit should be disposed of at once and we accordingly direct that the record of proceedings is to be sent back to the lower court."

That was the Allahabad High Court speaking in *1955* about the Ramajanma Bhumi cases which had by then been pending already for four years.

By 1989 the only contribution of the judicial process was that instead of two suits, there were five. All were taken over by the High Court. And a Special Bench of three judges was constituted to hear all of them together.

The mosque at Ramajanma Bhumi had been a Shia mosque. According to Sunni fundamentalists mosques of Shias are not mosques at all. Yet the Sunni Wakf Board waded into the matter. Excavations at the site were kept from being resumed on one pretext after the other: There are graves of Babur's soldiers in the vicinity, it was said, and Islam does not allow graves to be disturbed; apart from the fact that in Saudi Arabia the graves of even the companions of the Prophet have been uprooted and erased, the site has since been bulldozed and not a trace of any grave has surfaced; yet the pretext was enough to halt all excavations for 15 years. In the courts the cases were kept from proceeding by similar devices. And every prospect of the *mutwalli* and others agreeing to shift the mosque was scotched.

Even then the matter could have been settled by deciding at the threshold whether suits such as the ones instituted by the Sunni Wakf Board were admissible at all. Did the Statute of Limitations not apply in this instance ? Had the suits been filed within the prescribed period ? On 12 January 1990 the Supreme Court advised the Allahabad High Court to direct its attention to this point. It observed :

> "If the defendants press the contention regarding maintainability grounded upon limitation to be raised as a preliminary issue, the High Court which is trying the case will do well to entertain the request."

The High Court flatly refused to heed the counsel of the Supreme Court, and by its order of 22 August, 1990, refused to decide any issue as a preliminary issue.

An appeal was filed against that order with the Supreme Court in September 1990, for if the suits were not maintainable at all, the matter would be over. Nothing was done. The appeal remained pending.

In October 1991 the UP Government took over the land under and around the structure. Writs were filed both in the High Court and Supreme Court against the acquisition.

On 15 November 1991 the Supreme Court transferred all the writs to the High Court. It said that the High Court was taking over the cases for final disposal in December 1991.

Even in July 1992 the hearings were still going on.

When the Kar Seva began in July 1992 the Supreme Court said that if the UP Government could stop the Kar Seva the Supreme Court would transfer the acquisition cases to itself and decide them all together. The Kar Seva was stopped. But the Supreme Court eventually decided not to take over the cases on the ground that the hearings before the High Court were far advanced. It stressed however that the High Court should expedite the hearings and decide the case expeditiously.

Kar Seva was set for 6 December 1992. The High Court concluded its hearings on 4 November 1992. The UP Government and others repeatedly requested it to deliver its judgement, one way or the other. To no avail. Instead, one of the judges proceeded on leave.

The structure was demolished on 6 December 1992. The High Court delivered its judgement on 11 December 1992!

Even as proceedings in courts remained stalled — by the usual devices, and by the predilections of the courts themselves — efforts were on to find a solution by other means. As Muslim leaders had said that if it could be shown that a temple had existed at the site before the mosque was built, they would themselves advise Muslims to hand over the site to the Hindus, Mr. Chandra Shekhar's Government identified this as the "core question" to be settled : Was there a Hindu structure at the site before the mosque was built ? Representatives of the two sides garnered evidence and submitted it to Government. In doing so the Babri Masjid Action Committee was assisted and guided by a number of leftist historians. When it became evident that the evidence was all going the other way, they stopped sending the notes they had agreed to provide, they did not turn up for the meetings which the Government had scheduled in consultation with them.

The Government of Mr. Narasimha Rao proceeded to delay, prevaricate, dodge the issue, take it up, attempt deals, float formulae, collect evidence, say one thing to one side and something else to the other...

The structure was demolished, a make-shift temple stood in its place.

One of the things the Government did subsequently was to revert to the "core question" which had been identified by the previous Government. Under Article 143 (1) of the Constitution the Government requested the Supreme Court to assess

> "Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi-Babri Masjid (including the premises of the inner and outer courtyards of such structure) in the area on which the structure stood."

In spite of the way cases had dragged on in the courts for 42 years, in spite of the way the Supreme Court itself had proceeded in the matter, much was expected of the Supreme Court. After all, both sides had agreed earlier that this was the "core question". After all, no one could doubt that a pronouncement by the Supreme Court on the facts would have a decisive influence on public opinion, and thereby on the organizations which were directly involved in the dispute.

Barring holidays and the summer vacation, five judges of the Supreme Court heard the case three days every week from February to September, 1994. And, alas ! in the end they decided not to answer the Reference at all.

Several questions hit one at once. Evidence of various kinds, and of unanswerable authenticity showed that the question that the President had referred to the Supreme Court deserved but one answer : Yes, there was a temple at the site. Would the Court have returned the question unanswered had the evidence weighed as heavily on the other side — if it was as clear from it that there had been no temple at the site ?

On the other side, the Court's judgement marked an important reaffirmation : in the eyes of law, the Supreme Court declared, a place of worship like a mosque is a piece of property and as such is subject to the normal civil laws which apply to any other piece of property. Would the Court have reaffirmed this fact as unambiguously if the structure had still been standing?

Was the Court's approach unduly legalistic ? Did it reflect the colonial predispositions which the Indian elite has internalized ? How could one square its observation that the Kar Sevaks who destroyed the building had no religion, that they were just criminals, that an entire community cannot be held responsible for what a few did, with its declaration that Hindu society must carry the cross of consequences on its chest as the ones who destroyed the structure "are suspected to be persons professing to practise the Hindu religion" ? Had the Court missed an opportunity to help solve a national problem ? Or had it been right in keeping itself away from a problem which was in any case not amenable to judicial determination?

Is it really the case that the question could only be settled by archaeologists etc., and that the judges, not being specialists in these fields, could not adjudge the evidence ? Do they not routinely weigh evidence on matters on which they are not specialists — they are not surgeons, yet they decide whether a surgeon has been negligent; they are not experts in aviation, yet they affix responsibility for a crash; they are not irrigation engineers, yet they apportion river waters between states; they are not technologists, yet they determine what effects some change in the location or technology of a refinery shall have, on its economics, its throughput, on the environment. Similarly, courts — the Supreme Court in particular — routinely ask experts to assist them. Could the judges not have sought the assistance of experts this time round ? In any case, was the evidence all that complicated ? What sort of evidence would the Court have encountered had it examined the question ?

The cases got nowhere after being knocked about the courts for 42 years. Will the decision to send them back to the same courts help solve the problem, or does it amount to planting a time-bomb for the future ?

The immediate question of the temple aside, what general principles emerge from the Court's judgement ? Do these take us a step towards true secularism ? If so, will the courts, indeed the Supreme Court itself, have the courage to abide by them ?

The commentaries in this volume take up these and other questions. As the reader will see, the contributors differ in their answers to specific questions. What they share is a concern for the state of our country, and a feeling that in this instance at least the Court could have done more to alleviate that condition.

December 1994 ARUN SHOURIE

THE JUDGEMENT

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

TRANSFERRED CASE (C) NOS. 41, 43 & 45 OF 1993

Dr. M. Ismail Faruqui etc. — Petitioners
vs.
Union of India & Ors. — Respondents

WITH

WRIT PETITION (CIVIL) NO. 208 OF 1993

Mohd. Aslam — Petitioner
vs.
Union of India & Ors. — Respondents

WITH

SPECIAL REFERENCE NO. 1 OF 1993 UNDER ARTICLE 143 (1) OF THE CONSTITUTION OF INDIA

WITH

I.A. NO. 1 OF 1994 IN T.C. (C) NO. 44 OF 1993

Hargyan Singh — Petitioner
vs.
State of U.P. and Ors. — Respondents

WITH

TRANSFERRED CASE (C) NO. 42 OF 1993

Thakur Vijay Ragho Bhagwan
Birajman Mandir and Anr. — Petitioners
vs.
Union of India and Ors. — Respondents

WITH

WRIT PETITION (C) NO. 186 OF 1994

Jamiat-Ulama-e-Hind and Anr. — Petitioners
vs.
Union of India & Ors. — Respondents

Majority Judgement*

J.S. VERMA, J.

> "We have just enough religion to make us hate, but not enough to make us love one another."
>
> — Jonathan Swift

1. Swami Vivekananda said:

> "Religion is not in doctrines, in dogmas, nor in intellectual argumentation; it is being and becoming, it is realisation."

This thought comes to mind as we contemplate the roots of this controversy. Genesis of this dispute is traceable to erosion of some fundamental values of the plural commitments of our polity.

2. The constitutional validity of the Acquisition of Certain Area at Ayodhya Act, 1993 (No. 33 of 1993) (hereinafter referred to as "Act No.33 of 1993" or "the Act") and the maintainability of Special Reference No. 1 of 1993 (hereinafter referred to as "the Special Reference") made by the President of India under Article 143(1) of the Constitution of India are the questions for decision herein. The background in which these questions are to be answered is contained in the facts stated in the *White Paper* on Ayodhya, February 1993, issued by the Government of India.

3. Certain undisputed facts emerging at the hearing may also have relevance for this purpose. These questions are answered on this basis, eschewing facts which are in the area of controversy and have yet to be adjudicated.

---

* For M.N. Venkatachaliah, CJI, G.N. Ray, J., and himself.

Background

4. The Bill was introduced in Parliament leading to the above enactment and the said Reference to this Court was made in the historical background set out in the *White Paper*. Indeed, the two simultaneous acts are an indication of the legislative intent for enactment of the statute, the reference being made as a part of the same exercise with a view to effectuate the purpose of the enactment. This is how, they have to be viewed.

5. The "Overview" at the commencement of the *White Paper* in Chapter I states thus:

> "1.1 Ayodhya situated in the north of India is a township in District Faizabad of Uttar Pradesh. It has long been a place of holy pilgrimage because of its mention in the epic Ramayana as the place of birth of Shri Ram. The structure commonly known as Ram Janma Bhoomi-Babri Masjid was erected as a mosque by one Mir Baqi in Ayodhya in 1528 AD. It is claimed by some sections that it was built at the site believed to be the birth-spot of Shri Ram where a temple had stood earlier. This resulted in a long-standing dispute.
>
> 1.2 The controversy entered a new phase with the placing of idols in the disputed structure in December, 1949. The premises were attached under section 145 of the Code of Criminal Procedure. Civil suits were filed shortly thereafter. Interim orders in these civil suits restrained the parties from removing the idols or interfering with their worship. In effect, therefore, from December, 1949 till December 6, 1992 the structure had not been used as a mosque."

6. The movement to construct a Ram temple at the site of the disputed structure gathered momentum in recent years which became a matter of great controversy and a source of tension. This led to several parleys the details of which are not very material for the present purpose. These parleys involving the Vishva Hindu Parishad (VHP) and the All India Babri Masjid Action Committee (AIBMAC), however, failed to resolve the dispute. A new dimension was added to the campaign for construction of the temple with the formation of the Government in Uttar Pradesh in June 1991 by the Bharatiya Janata Party (BJP) which declared its commitment to the construction of the temple and took certain steps like the acquisition of land adjoining the disputed structure while leaving out the disputed structure itself from the acquisition. The focus of the temple construction movement from October 1991 was to start construction of the temple by way of 'kar-sewa' on the land acquired by the Government of Uttar Pradesh while leaving the disputed structure intact. This attempt did not succeed and there was litigation in the Allahabad High Court as well as in this Court. There was a call for resumption of kar sewa from 6th December, 1992 and the announcement made by the organisers was for a symbolic kar sewa without violation of the court orders including those made in the proceedings pending in this Court. In spite of initial reports from Ayodhya on 6th December, 1992 indicating an air of normalcy, around mid-day a crowd addressed by leaders of BJP, VHP, etc. climbed the Ram Janma Bhumi-Babri Masjid (RJM-BM) structure and started damaging the domes. Within a short time, the entire structure was demolished and razed to the ground. Indeed, it was an act of "national shame". What was demolished was not merely an ancient structure; but the faith of the minorities in the sense of justice and fairplay of majority. It shook their faith in the rule of law and constitutional processes. A five hundred year old structure which was defenseless and whose safety was a sacred trust in the hands of the State Government was demolished.

7. After referring to the details on this tragedy, the *White Paper* in Chapter I on "OVERVIEW" concludes thus:

> 1.35 The demolition of the Ram Janma Bhoomi-Babri Masjid structure at Ayodhya on 6th December, 1992 was a most reprehensible act. The perpetrators of this deed struck not only against a place of worship, but also at the principles of secularism, democracy and the rule of law enshrined in our Constitution. In a move as sudden as it was shameful, a few thousand people managed to outrage the sentiments of millions of Indians of all communities who have reacted to this incident with anguish and dismay.
>
> 1.36 What happened on December 6, 1992 was not a failure of the system as a whole, nor of the wisdom inherent in India's Constitution, nor yet of the power of tolerance, brotherhood and compassion that has so vividly informed the life of independent India. It was, the Supreme Court observed on that day, "a great pity that a Constitutionally elected Government could not discharge its duties in a matter of this sensitiveness and magnitude." Commitments to the Court and Constitution, pledges to Parliament

> and the people, were simply cast aside. Therein lay the failure, therein the betrayal.
>
> 1.37. Today India seeks to heal, and not reopen its wounds; to look forward with hope, and not backwards with fear; to reconcile reason with faith. Above all, India is determined to press ahead with the National Agenda, undeterred by aberrations.

8. It may be mentioned that a structure called the Ram-chabutra stood on the disputed site within the courtyard of the disputed structure. This structure also was demolished on 6th December, 1992 (Appendix-V to the *White Paper*). Worship of the idols installed on the Ram-chabutra by Hindu devotees in general, it appears, had been performed for a considerable period of time without any objection by the Muslims to its worship at that place, prior to the shifting of the idols from the Ram-chabutra to the disputed structure in December 1949. As a result of demolition of Ram-chabutra also on 6th December 1992, the worship by Hindus in general even at that place was interrupted. Thereafter, the worship of idols is being performed only by a priest nominated for the purpose without access to the public.

9. A brief reference to certain suits in this connection may now be made. In 1950, two suits were filed by some Hindus; in one of these suits in January 1950, the trial court passed interim orders whereby the idols remained at the place where they were installed in December 1949 and their puja by the Hindus continued. The interim order was confirmed by the High Court in April 1955. On 1st February, 1986, the District Judge ordered the opening of the lock placed on a grill leading to the sanctum-sanctorum of the shrine in the disputed structure and permitted puja by the Hindu devotees. In 1959, a suit was filed by the Nirmohi Akhara claiming title to the disputed structure. In 1961, another suit was filed claiming title to the disputed structure by the Sunni Central Wakf Board. In 1989, Deoki Nandan Agarwal, as the next friend of the Deity filed a title suit in respect of the disputed structure. In 1989, the aforementioned suits were transferred to the Allahabad High Court and were ordered to be heard together. On 14th August, 1989, the High Court ordered the maintenance of status quo in respect of the disputed structure

(Appendix-I to the *White Paper*). As earlier mentioned, it is stated in para 1.2 of the *White Paper* that:

> "interim orders in these civil suits restrained the parties from removing the idols or interfering with their worship. In effect, therefore, from December, 1949 till December 6, 1992 the structure had not been used as a mosque".

10. Prior to December 1949 when the idols were shifted into the disputed structure from the Ram-chabutra, worship by Hindu devotees at the Ram-chabutra for a long time without any objection from Muslims is also beyond controversy. A controversy, however, is raised about use of the disputed structure as a mosque from 1934 to December 1949. One version is that after some disturbances in 1934, the use of the disputed structure as a mosque had been stopped from 1934 itself and not merely from December 1949. The other side disputes the alleged disuse of the mosque for prayers prior to December 1949. The stand of the Uttar Pradesh Government in the suits was that the place was used as mosque till 1949.

11. As a result of the incidents at Ayodhya on 6th December, 1992, the President of India issued a proclamation under Article 356 of the Constitution of India assuming to himself all the functions of the Government of Uttar Pradesh, dissolving the U.P. Vidhan Sabha. The *White Paper* in Chapter II mentions the "BACKGROUND" and therein it is stated as under:

> 2.1 At the centre of the RJB-BM dispute is the demand voiced by Vishwa Hindu Parishad (VHP) and its allied organisations for the restoration of a site said to be the birth place of Sri Ram in Ayodhya. Till 6th December, 1992 this site was occupied by the structure erected in 1528 by 'Mir Baqi' who claimed to have built it on orders of the first Mughal Emperor Babar. This structure has been described in the old Government records as Masjid Janmasthan. It is now commonly referred to as Ram Janma Bhumi-Babri Masjid.
>
> 2.2 The VHP and its allied organisations base their demand on the assertion that this site is the birth place of Sri Ram and a Hindu temple commemorating this site stood here till it was destroyed on Babar's command and a Masjid was erected in its place. The demand of the VHP has found support from the Bharatiya Janata Party (BJP). The construction of a Ram temple at the disputed site, after removal or relocation of the existing structure, was a major plank in BJP's campaign during elections

held in 1989 and 1991. Other major political parties, however, had generally opposed this demand and had taken the stand that while a temple should be built, the issues in dispute should be resolved either by negotiations or by orders of the Court.

2.3 During the negotiations aimed at finding an amicable solution to the dispute, one issue which came to the fore was whether a Hindu temple had existed on the site occupied by the disputed structure and whether it was demolished on Babar's orders for the construction of the Masjid. It was stated on behalf of the Muslim organisations, as well as by certain eminent historians, that there was no evidence in favour of either of these two assertions. It was also stated by certain Muslim leaders that if these assertions were proved, the Muslims would voluntarily handover the disputed shrine to the Hindus. Naturally, this became the central issue in the negotiations between the VHP and AIBMAC.

2.12 The historical debate has thus remained inconclusive although much progress has been made in identifying the areas of agreement and difference. Conclusive findings can be obtained only by way of reference to a competent authority. However, as brought out elsewhere in this Paper the negotiations were disrupted at a crucial phase. Now, the entire evidence has disappeared along with the disputed structure. It is tragic and ironical that the Ram Chabutra and Kaushalya Rasoi, which continued as places of worship during periods of Muslim and British rule have disappeared along with the RJB-BM structure at the hands of people professing to be 'devotees' of Lord Ram.

Placing of Idols in the disputed structure

2.13 As has been mentioned above, Hindu structures of worship already existed in the outer courtyard of the RJB-BM structure. On the night of 22nd/23rd December, 1949, however, Hindu idols were placed under the central dome of the main structure. Worship of these idols was started on a big scale from the next morning. As this was likely to disturb the public peace, the civil administration attached the premises under section 145 of the Code of Criminal Procedure. This was the starting point of a whole chain of events which ultimately led to the demolition of the structure. The main events of this chain have been summarised in *Appendix-I.*

2.14 Soon after the installation of the idols two civil suits were filed by Hindu plaintiffs seeking to restrain the Administration from removing the idols from the disputed structure or placing any restrictions in the way of devotees intending to offer worship. Interim injunctions were issued by the civil court to this effect. These injunctions were confirmed by the Allahabad High Court in 1955.

2.15 The Hindu idols thus continued inside the disputed structure since 1949. Worship of these idols by Hindus also continued without interruption since 1949 and the structure was not used by the Muslims for offering prayers since then. The controversy remained at a low ebb till 1986 when the District Court of Faizabad ordered opening of the lock placed on a grill leading to the sanctum-sanctorum of the shrine. An organisation called the Babri Masjid Action Committee (BMAC), seeking restoration of the disputed shrine to the Muslims came into being and launched a protest movement. The Hindu organisations, on the other hand, stepped up their activities to mobilise public opinion for the construction of a Ram temple at the disputed site.

12. After the imposition of President's rule in the State of Uttar Pradesh as a consequence of the events at Ayodhya on 6th December, 1992, action taken by the Central Government is detailed in Chapter VIII of the *White Paper* with reference to the communal situation in the country which deteriorated sharply following the demolition of the RJB-BM structure on 6th December, 1992 and spread of communal violence in several other States. Para 8.11 in Chapter VIII relating to the "ACTION TAKEN BY THE CENTRAL GOVERNMENT" is an under:

> 8.11 Mention has been made above (Overview) of the decisions taken on 7th December by the Government to ban communal organisations, to take strong action for prosecution of the offences connected with the demolition, to fix responsibilities of various authorities for their lapses relating to the events of December 6, to rebuild the demolished structure and to take appropriate steps regarding new Ram Temple. The last two decisions were further elaborated on 27th December as follows:
>
> "The Government has decided to acquire all areas in dispute in the suits pending in the Allahabad High Court. It has also been decided to acquire suitable adjacent area. The acquired area excluding the area on which the disputed structure stood would be made available to two Trusts which would be set up for construction of a Ram Temple and a Mosque respectively and for planned development of the area.
>
> "The Government of India has also decided to request the President to seek the opinion of the Supreme Court on the question whether there was a Hindu temple existing on the site where the disputed structure stood. The Government has also decided to abide by the opinion of the Supreme Court and to take appropriate steps to enforce the Court's opinion. Notwithstanding the acquisition of the disputed area, the Government would ensure that the position existing prior to the promulgation of the Ordinance is maintained until such time as the Supreme Court gives its opinion in the matter. Thereafter the rights of the parties shall be determined in the light of the Court's opinion.
>
> "In pursuance of these decisions an ordinance named 'Acquisition of

Certain Area at Ayodhya Ordinance' was issued on 7th January 1993 for acquisition of 67.703 acres of land in the Ram Janma Bhoomi-Babri Masjid complex. A reference to the Supreme Court under article 143 of the Constitution was also made on the same day. Copy of the ordinance is at *Appendix-XV* and of the reference at *Appendix-XVI.*"

13. The Acquisition of Certain Area at Ayodhya Ordinance, 1993 (No.8 of 1993) has been replaced by the Acquisition of Certain Area at Ayodhya Act, 1993 (No.33 of 1993), the constitutional validity of which has to be examined by us.

14. The said Ordinance, later replaced by Act No.33 of 1993, and the Special Reference under Article 143(1) of the Constitution of India were made simultaneously the same day on 7th January, 1993. It would be appropriate at this stage to quote, in extenso, the Statement of Objects and Reasons for this enactment, the said Act No.33 of 1993, and the Special Reference under Article 143(1) of the Constitution.

Statement of Objects and Reasons

There has been a long-standing dispute relating to the erstwhile Ram Janma Bhumi-Babri Masjid structure in Ayodhya which led to communal tension and violence from time to time and ultimately led to the destruction of the disputed structure on 6th December, 1992. This was followed by wide-spread communal violence which resulted in large number of deaths, injuries and destruction of property in various parts of the country. The said dispute has thus affected the maintenance of public order and harmony between different communities in the country. As it is necessary to maintain communal harmony and the spirit of common brotherhood amongst the people of India, it was considered necessary to acquire the site of the disputed structure and suitable adjacent land for setting up a complex which could be developed in a planned manner wherein a Ram temple, a mosque, amenities for pilgrims, a library, museum and other suitable facilities can be set up.

2. The Acquisition of Certain Area at Ayodhya Ordinance, 1993 was accordingly promulgated by the President on 7th January, 1993. By virtue of the said Ordinance the right, title and interest in respect of certain areas at Ayodhya specified in the Schedule to the Ordinance stand transferred to, and vest in, the Central Government.

3. The Bill seeks to replace the aforesaid Ordinance.

S.B. CHAVAN.

NEW DELHI;
The 9th March, 1993."

Special Reference

"WHEREAS a dispute has arisen whether a Hindu temple or any Hindu religious structure existed prior to the construction of the structure (including the premises of the inner and outer courtyards of such structure), commonly known as the Ram Janma Bhumi-Babri Masjid, in the area in which the structure stood in village Kot Ramachandra in Ayodhya, in Pargana Haveli Avadh, in Tehsil Faizabad Sadar, in the district of Faizabad of the State of Uttar Pradesh;

2. AND WHEREAS the said area is located in Revenue Plot Nos. 159 and 160 in the said village Kot Ramachandra;

3. AND WHEREAS the said dispute has affected the maintenance of public order and harmony between different communities in the country;

4. AND WHEREAS the aforesaid area vests in the Central Government by virtue of the Acquisition of Certain Area at Ayodhya Ordinance, 1993;

5. AND WHEREAS notwithstanding the vesting of the aforesaid area in the Central Government under the said Ordinance the Central Government proposes to settle the said dispute after obtaining the opinion of the Supreme Court of India and in terms of the said opinion;

6. AND WHEREAS in view of what has been hereinbefore stated it appears to me that the question hereinafter set out has arisen and is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court of India thereon;

7. NOW, THEREFORE, in exercise of the powers conferred upon me by clause (I) of article 143 of the Constitution of India, I, Shankar Dayal Sharma, President of India, hereby refer the following question to the Supreme Court of India for consideration and opinion thereon, namely:

Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi-Babri Masjid (including the premises of the inner and outer courtyards of such structure) in the area on which the structure stood?

Sd/-
President of India

New Delhi;
Dated 7th January, 1993."

The Acquisition of Certain Area at Ayodhya Act, 1993
(No.33 of 1993)

[3rd April, 1993]

"An Act to provide for the acquisition of certain area at Ayodhya and for matters connected therewith or incidental thereto.

WHEREAS there has been a long-standing dispute relating to the structure (including the premises of the inner and outer courtyards of such structure), commonly known as the Ram Janma Bhumi-Babri Masjid, situated in village Kot Ramachandra in Ayodhya, in Pargana Haveli Avadh, in Tehsil Faizabad Sadar, in the district of Faizabad of the State of Uttar Pradesh;

AND WHEREAS the said dispute has affected the maintenance of public order and harmony between different communities in the country;

AND WHEREAS it is necessary to maintain public order and to promote communal harmony and the spirit of common brotherhood amongst the people of India;

AND WHEREAS with a view to achieving the aforesaid objectives, it is necessary to acquire certain areas in Ayodhya;

BE it enacted by Parliament in the Forty-fourth Year of the Republic of India as follows:

Chapter I — Preliminary

1. Short title and commencement:

1. This Act may be called the Acquisition of Certain Area at Ayodhya Act, 1993.

2. It shall be deemed to have come into force on the 7th day of January, 1993.

2. Definitions: In this Act unless the context otherwise requires,

(a) "area" means the area (including all the buildings, structures or other properties comprised therein) specified in the Schedule;

(b) "authorised person" means a person or body of persons or trustees of any trust authorised by the Central Government under section 7;

(c) "Claims Commissioner" means the Claims Commissioner appointed under sub-section (2) of section 8;

(d) "prescribed" means prescribed by rules made under this Act.

Chapter II — Acquisition of the Area in Ayodhya

3. Acquisition of rights in respect of certain area:

On and from the commencement of this Act, the right, title and interest in relation to the area shall, by virtue of this Act, stand transferred to, and vest in, the Central Government.

4. General effect of vesting:

1. The area shall be deemed to include all assets, rights, leaseholds, powers, authority and privileges and all property, movable and immovable, including lands, buildings, structures, shops of whatever nature or other properties and all other rights and interests in, or arising out of, such properties as were immediately before the commencement of this Act in the ownership, possession, power or control of any person or the State Government of Uttar Pradesh, as the case may be, and all registers, maps, plans, drawings and other documents of whatever nature relating thereto.

2. All properties aforesaid which have vested in the Central Government under section 3 shall, by force of such vesting, be freed and discharged from any trust, obligation, mortgage, charge, lien and all other encumbrances affecting them and any attachment, injunction decree or order of any court or tribunal or other authority restricting the use of such properties in any manner or appointing any receiver in respect of the whole or any part of such properties shall cease to have any effect.

3. If, on the commencement of this Act, any suit, appeal or other proceeding in respect of the right, title and interest relating to any property which has vested in the Central Government under section 3, is pending before any court, tribunal or other authority, the same shall abate.

5. Duty of person or State Government in charge of the management of the area to deliver all assets, etc:

1. The Central Government may take all necessary steps to secure possession of the area which is vested in that Government under section 3.

2. on the vesting of the area in the Central Government under section 3, the person or State Government of Uttar Pradesh, as the case may be, in charge of the management of the area immediately before such vesting shall be bound to deliver to the Central Government or the authorised person, all assets, registers and other documents in their custody relating to such vesting or where it is not practicable to deliver such registers or documents, the copies of such registers or documents authenticated in the prescribed manner.

6. Power of Central Government to direct vesting of the area in another authority or body or trust:

1. Notwithstanding anything contained in sections 3, 4, 5, and 7, the Central Government may, if it is satisfied that any authority or other body, or trustees of any trust, set up on or after the commencement of this Act is or are willing to comply with such terms and conditions as that Government may think fit to impose, direct by notification in the Official Gazette, that the right, title and interest or any of them in relation to the area or any part thereof, instead of continuing to vest in the Central Government, vest in that authority or body or trustees of that trust either on the date of the notification or on such later date as may be specified in the notification.

2. When any right, title and interest in relation to the area or part thereof vest in the authority or body or trustees referred to in sub-section (1), such rights of the Central Government in relation to such area or part thereof, shall, on and from the date of such vesting, be deemed to have become the rights of that authority or body or trustees of that trust.

3. The provisions of sections 4, 5, 7 and 11 shall, so far as may be, apply in relation to such authority or body or trustees as they apply in relation to the Central Government and for this purpose references therein to the "Central Government" shall be construed as references to such authority or body or trustees.

Chapter III — Management and Administration of Property

7. Management of Property by Government:

1. Notwithstanding anything contained in any contract or instrument or order of any court, tribunal or other authority to the contrary, on and from the commencement of this Act, the property vested in the Central Government under section 3 shall be managed by the Central Government or by a person or body of persons or trustees of any trust authorised by that Government in this behalf.

2. In managing the property vested in the Central Government under section 3, the Central Government or the authorised person shall ensure that the position existing before the commencement of this Act in the area on which the structure (including the premises of the inner and outer courtyards of such structure), commonly known as the Ram Janma Bhumi-Babri Masjid, stood in village Kot Ramachandra in Ayodhya, in Pargana Haveli Avadh, in Tehsil Faizabad Sadar, in the district of Faizabad of the State of Uttar Pradesh is maintained.

Chapter IV — Miscellaneous

8. Payment of amount:

1. The owner of any land, building, structure or other property comprised in the area shall be given by the Central Government, for the transfer to and vesting in that Government under section 3 of that land, building, structure or other property, in cash an amount equivalent to the market value of the land, building, structure or other property.

2. The Central Government shall, for the purpose of deciding the claim of the owner or any person having a claim against the owner under sub-section (1), by notification in the Official Gazette, appoint a Claims Commissioner.

3. The Claims Commissioner shall regulate his own procedure for receiving and deciding the claims.

4. The owner or any person having a claim against the owner may make a claim to the Claims Commissioner within a period of ninety days from the date of commencement of this Act;

Provided that if the Claims Commissioner is satisfied that the claimant was prevented by sufficient cause from preferring the claim within the said period of ninety days, the Claims Commissioner may entertain the claim within a further period of ninety days and not thereafter.

9. Act to override all other enactments:

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any law other than this Act or any decree or order of any court, tribunal or other authority.

10. Penalties:

Any person who is in charge of the management of the area and fails to deliver to the Central Government or the authorised person any asset, register or other document in his custody relating to such area or, as the case may be, authenticated copies of such register or document, shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to ten thousand rupees, or with both.

11. Protection of action taken in good faith:

No suit, prosecution or other legal proceeding shall lie against the Central Government or the authorised person or any of the officers or other employees of that Government or the authorised person for anything which is in good faith done or intended to be done under this Act.

12. Power to make rules:

1. The Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

2. Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the sessions immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree than the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

13. Repeal and saving:

1. Subject to the provisions of sub-section (2), the Acquisition of Certain Area at Ayodhya Ordinance, 1993, is hereby repealed.

2. Notwithstanding anything contained in the said Ordinance,

(a) the right, title and interest in relation to plot No.242 situated in village Kot Ramachandra specified against S1. No.1 of the Schedule to the said Ordinance shall be deemed never to have been transferred to, and vested in, the Central Government;

(b) any suit, appeal or other proceeding in respect of the right, title and interest relating to the said plot No.242, pending before any court, tribunal or other authority, shall be deemed never to have abated and such suit, appeal or other proceeding (including the orders or interim orders of any court thereon) shall be deemed to have been restored to the position existing immediately before the commencement of the said Ordinance;

(c) any other action taken or thing done under that Ordinance in relation to the said plot No.242 shall be deemed never to have been taken or done.

3. Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.

"The Schedule"

[See section 2(a)]

Description of the Area

x x x x x x x x x

15. At the hearing, it was strenuously urged that the question of fact referred under Article 143(1) of the Constitution is vague; the answer to it is by itself not decisive of the real controversy since the core question has not been referred; and it also gives no definite indication of the manner in which the Central Government intends to act after the Special Reference is answered, to settle the dispute. It was urged that the question referred is, therefore, academic, apart from being vague, and it does not serve any constitutional purpose to subserve which the advisory jurisdiction of this Court could be invoked; that the real object and purpose of reference is to take away a place of worship of the Muslims and give it away to the Hindus offending the basic feature of secularism; and that, therefore, we should decline to answer the Special Reference. The learned Solicitor General who appeared for the Union of India was asked to clarify the stand of the Central Government on this point. Initially, it was stated by the learned Solicitor General that the answer to the question would provide the basis for further negotiations between the different groups to settle the controversy and the Central Government would then be able to decide the effective course available to it for resolving the controversy. On being asked to further clarify the stand of the Central Government about the purpose of the Special Reference, the learned Solicitor General made a statement in writing on behalf of the Union of India on 14th September, 1994 as under:

> "Government stands by the policy of secularism and of even-handed treatment of all religious communities. The Acquisition of Certain Area at Ayodhya Act, 1993, as well as the Presidential Reference, have the objective of maintaining public order and promoting communal harmony and the spirit of common brotherhood amongst the people of India.

> Government is committed to the construction of a Ram temple and a mosque, but their actual location will be determined only after the Supreme Court renders its opinion in the Presidential Reference.
>
> Government will treat the finding of the Supreme Court on the question of fact referred under Article 143 of the Constitution as a verdict which is final and binding.
>
> In the light of the Supreme Court's opinion and consistent with it, Government will make efforts to resolve the controversy by a process of negotiations. Government is confident that the opinion of the Supreme Court will have a salutary effect on the attitudes of the communities and they will no longer take conflicting positions on the factual issue settled by the Supreme Court.
>
> If efforts at a negotiated settlement as aforesaid do not succeed, Government is committed to enforce a solution in the light of the Supreme court's opinion and consistent with it. Government's action in this regard will be even-handed in respect of both the communities. If the question referred is answered in the affirmative, namely, that a Hindu temple/structure did exist prior to the construction of the demolished structure, Government action will be in support of the wishes of the Hindu community. If, on the other hand, the question is answered in the negative, namely, that no such Hindu temple/structure existed at the relevant time, then Government action will be in support of the wishes of the Muslim community."

This statement in writing made by the learned Solicitor General on behalf of the Union of India forms a part of the record and has to be taken into account to indicate the purpose for which the Special Reference under Article 143(1) has been made to this Court.

16. The dispute and its background are mentioned in paras 2.1, 2.2 and 2.3 of Chapter II of the *White Paper* quoted earlier. This is the backdrop in which the constitutional validity of Act No.33 of 1993 and the maintainability of the Special Reference made under Article 143(1) of the Constitution of India have to be examined.

Validity of Act No. 33 of 1993

17. Broadly stated, the focus of challenge to the statute as a whole is on the grounds of secularism, right to equality and right to freedom of religion. Challenge to the acquisition of the area in excess of the disputed area is in addition on the ground that the acquisition was unnecessary being unrelated to the dispute pertaining to the small disputed area within it. A larger argument advanced on behalf of some of the parties who have assailed the Act with considerable vehemence is that a mosque being a place of religious worship by the Muslims, independently of whether the acquisition did affect the right to practice religion, is wholly immune from the State's power of acquisition and the statute is, therefore, unconstitutional as violative of Articles 25 and 26 of the Constitution of India for this reason alone. The others, however, limited this argument of immunity from acquisition only to places of special significance, forming an essential and integral part of the right to practice the religion, the acquisition of which would result in the extinction of the right to freedom of religion itself. It was also contended that the purpose of acquisition in the present case does not bring the statute within the ambit of Entry 42, List III but is referable to Entry 1, List II and, therefore, the Parliament did not have the competence to enact the same. It was then urged by learned counsel canvassing the Muslim interest that the legislation is tilted heavily in favour of the Hindu interests and, therefore, suffers from the vice of non-secularism and discrimination in addition to violation of the right to freedom of religion of the Muslim community. It was also urged by them that the Central Government, after the Prime Minister's statement made on 7th December, 1992, to rebuild the demolished structure (para 1.22 in Chapter I of the *White Paper*) resiled from the same and by incorporating certain provisions in the statute has sought to perpetuate the injustice done to the Muslim community by the act of vandalism of demolition of the structure at Ayodhya on 6th December, 1992. On behalf of the Muslim community, it is urged that the statute read in the context of the content of the question referred under Article 143(1) of the Constitution, as it must be, is a mere veiled concealment of a device adopted by the Central Government to perpetuate the consequences of the demolition of the mosque on 6th December, 1992. The grievance of the Hindu opponents is that the mischief and acts of vandalism committed by a few are being attributed to the entire Hindu community the majority of whom is equally hurt by, and critical of, the shameful act. They urge that this disapproval by the majority community is evident from the result of the subsequent elections in which the Bharatiya Janata Party was rejected at the hustings by the Hindu majority. They also submit that the fact of demolition of Hindu structures like the Ram-chabutra and Kaushalya Rasoi which stood since ages in the disputed site resulting in interruption of even the undisputed right of worship of Hindus within that area is being ignored. It is also contended that there is no justification for acquisition of any property in excess of the disputed area and, therefore, the acquisition at least of the excess area belonging, admittedly, to Hindus is invalid.

18. On behalf of the Central Government, it is urged that in the existing situation and in view of the widespread communal flare-up throughout the country on account of the events at Ayodhya on 6th December, 1992, the most appropriate course, in the opinion of the Central Government, was to make this acquisition along with the Special Reference to decide the question which would facilitate a negotiated solution of the problem, and if it failed, to enable the Central Government to take any other appropriate action to resolve the controversy and restore communal harmony in the country. It was made clear that acquisition of the disputed area was not meant to deprive the community found entitled to it, of the same, or to retain any part of the excess area which was not necessary for a proper resolution of the dispute or to effectuate the purpose of the acquisition. It was submitted that an assurance of communal harmony throughout the country was a prime constitutional purpose and avoidance of escalation of the dispute in the wake of the incident at Ayodhya on 6th December, 1992 was an essential step in that direction, which undoubtedly promotes the creed of secularism instead of impairing it. It was submitted that the charge levelled against the Central Government of discrimination against any religious community or of anti-secularism is wholly unwarranted.

19. Another argument advanced on behalf of the Muslim community was that the defences open to the minority community in the suits filed by the other side including that of adverse possession by virtue of long possession of the disputed site for over 400 years since its construction in 1528 AD have also been extinguished by the acquisition, giving an unfair advantage to the other side. It was also urged that the core question in the dispute between the parties was not the subject-matter of the Special Reference made under Article 143(1) of the Constitution and, therefore, answer to the same would not result in a resolution of the dispute between the parties to the suits. It was accordingly urged, there is deprivation of the judicial remedy for adjudication of the dispute without the substitution of an alternate dispute resolution mechanism, which is impermissible under the Constitution.

20. It is appropriate at this stage to refer to the provisions of the statute before we deal with the arguments challenging its constitutional validity. The Statement of Objects and Reasons says that there is a long-standing dispute relating to the disputed structure in Ayodhya which led to communal tension and violence from time to time and ultimately has led to the destruction of the disputed structure on 6th December, 1992 followed by widespread communal violence resulting in loss of many lives and destruction of property throughout the country. The said dispute has thus affected the maintenance of public order and communal harmony in the country. Obviously, it is necessary to maintain and promote communal harmony and fraternity amongst the people of India. With this objective in view it was considered necessary to acquire the site of the disputed structure and the requisite adjacent area to be utilised in an appropriate manner to achieve this object. For this purpose, the Acquisition of Certain Area at Ayodhya Ordinance, 1993 was promulgated by the President on 7th January, 1993 and, simultaneously, on the same day, this Reference was also made by the President to this Court under Article 143(1) of the Constitution. The said Ordinance was replaced by The Acquisition of Certain Area at Ayodhya Act, 1993 (No. 33 of 1993) to the same effect, and Section 1(2) provides that the Act shall be deemed to have come into force on the 7th January, 1993. The provisions of the said Act are now considered.

21. Section 3 provides for acquisition of rights in relation to the "area" defined in Section 2(a). It says that on and from the commencement of this Act the right, title and interest in relation to the area shall, by virtue of this Act, stand transferred to, and vest in, the Central Government. It is well-settled that the meaning of "vest" takes colour from the context in which it is used and it is not necessarily the same in every provision or in every context. In *Maharaj Singh* v. *State of Uttar Pradesh & Others*, (1977) 1 SCR 1072 at page 1081, it was held,

> "... Is such a construction of 'vesting' in two different senses in the same section, sound? Yes. It is, because 'vesting' is a word of slippery import and has many meanings. The context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning. That is why even definition clauses allow themselves to be modified by contextual compulsions...."

The meaning of "vest" in Section 3 and in Section 6 is of significance in the context of the constitutional validity of the statute. It can vary in different parts of the statute or even the same Section, depending on the context of its use.

22. Section 4 then provides the general effect of vesting. Obviously, the effect of vesting will depend on the meaning of the word "vest" used in Section 3 and the kind of vesting in the present context. Sub-section (1) of Section 4 provides that the area shall be deemed to include all assets, rights, etc. specified therein of whatever nature relating thereto. Sub-section (2) further says that all properties aforesaid which have vested in the Central Government under Section 3 shall, by force of such vesting, be freed and discharged from all encumbrances affecting them and any attachment, injunction, decree or order of any court or tribunal or other authority restricting the use of such properties in any manner or appointing any receiver in respect of the whole or any part of the property shall cease to have effect. In other words, the effect of such vesting is to free all properties aforesaid which have vested in the Central Government under Section 3 of all encumbrances and the consequence of any order of any court or tribunal of any kind restricting their user in any manner. Sub-section (3) of Section 4 provides for abatement of all pending suits and legal proceedings. The meaning of the word "vest" in Section 3 has a bearing on the validity of this provision since the consequence of abatement of suits etc. provided therein is relatable only to absolute vesting of the disputed area which is the subject matter of the suits and not to a situation where the vesting under Section 3 is of a limited nature for a particular purpose, and is of limited duration till the happening of a future event. Section 5 indicates the duty of the person or State Government in charge of the management of the area to deliver all assets etc. to the Central Government on such vesting. Sub-section (1) empowers the Central Government to take all necessary steps to secure possession of the area which is vested in the Central Government under Section 3. Sub-section (2) obliges the person or State Government of Uttar Pradesh, as the case may be, in charge of the management of the area immediately before such vesting to deliver to the Central Government or the authorised person all assets etc. in their custody relating to such vesting. In short, Section 5 provides the consequential action to be taken by the Central Government with the corresponding obligation of the person or State Government in charge of the management of the area to deliver possession of the area, together with its management, to the Central Government, on such vesting.

23. Then comes Section 6 which is the last Section in Chapter II, to which detailed reference would be made later. At this stage a general reference to its contents is sufficient. Section 6 contains the power of Central Government to direct vesting of the area in another authority or body or trust. Sub-section (1) provides that the Central Government may, notwithstanding anything contained in Sections 3, 4, 5, and 7, direct by notification in the Official Gazette, that the right, title and interest or any of them in relation to the area or any part thereof, instead of continuing to vest in the Central Government, vest in that authority or body or trustees of that trust from the specified date, if it is satisfied that the same is willing to comply with such terms and conditions as the Central Government may think fit to impose. In short, sub-section (1) empowers the Central Government to transfer its right, title and interest or any of them in the area or any part thereof to any authority or other body or trustees of any trust on such terms and conditions as it may think fit to impose, instead of continuing to retain the same itself. Sub-section (2) provides for the consequences of the action taken under sub-section (1) giving recognition to the statutory transfer effected by the Central Government to effectuate the purpose of such transfer by the Central Government by declaring that the transferee would then step into the shoes of the Central Government acquiring the same right, title and interest in the area or part thereof which by virtue of the enactment had earlier vested in the Central Government. Sub-section (3) is another consequence of the action taken under sub-section (1) and provides that Sections 4, 5, 7 and 11, so far as may be, would apply to such transferee as they apply in relation to the Central Government. It may here be recalled that Section 4 relates to the effect of vesting under Section 3; Section 5 to the duty of the person or State in charge of the management of the area to deliver possession etc. to the Central Government or the authorised person; Section 7 to the management and the administration of property by the Central Government on its vesting; and Section 11 gives protection to action taken in good faith by the Central Government or the authorised person or any one acting on its behalf under this Act.

24. Chapter III contains Section 7 alone which would be considered at length later in view of the serious challenge made to its constitutional validity. This Section deals with the management and administration of the property by the Central Government, on its vesting. Sub-section (1) provides for management of the property vested in the Central Government under Section 3 by the Central Government or by any authorised person, on such vesting, notwithstanding anything to the contrary contained in any contract or instrument or order of any court, tribunal or other authority. In other words, in spite of any contrary provision in any contract or instrument or order of any court, tribunal or other authority, from the commencement of this Act, the management of the property vested in the Central Government under Section 3 shall be by the Central Government or by an authorised person, so authorised by the Government in its behalf and none else. This provision expressly supersedes any earlier provision relating to the management of the property so vested in the Central Government. Sub-section (2) then provides for the manner of the management of the property by the Central Government or the authorised person. It mandates the Central Government or the authorised person, in managing the property vested in the Central Government under Section 3, to ensure that the position existing before the commencement of this Act "in the area on which the structure (including the premises of the inner and outer courtyards of such structure), commonly known as the Ram Janma Bhumi-Babri Masjid, stood" is maintained. This means that the power of management of the Central Government or the authorised person under sub-section (1) of Section 7 is coupled with the duty contained in the mandate given by sub-section (2). The mandate is that in managing the property so vested in the Central Government, the Central Government or the authorised person shall ensure maintenance of the status quo "in the area on which the structure (including the premises of the inner and outer courtyards of such structure), commonly known as the Ram Janma Bhumi-Babri Masjid, stood". There was some debate as to the meaning of the word "area" in this context. One construction suggested was that the word "area" used in this expression has the same meaning as in the definition contained in Section 2(a), that is, the entire area specified in the Schedule to the Act. Section 2 itself says that the definitions therein give the meaning of the words defined "unless the context otherwise requires". The context in which the word "area" is used in the expression in Section 7(2) gives the clear indication that its meaning is not the same as in Section 2(a) to mean the entire area specified in the Schedule since the words which follow qualify its meaning confining it only to the site on which this structure, commonly known as the Ram Janma Bhumi-Babri Masjid stood, which site or area is undoubtedly smaller and within "the area specified in the Schedule".

25. Chapter IV contains the miscellaneous provisions. Therein Section 8 provides for payment of amount equivalent to the market value of the land, building, structure or other property by the Central Government for the transfer to, and vesting of the property in, the Government under Section 3, to its owner. Remaining part of Section 8 contains the machinery provisions for payment of the amount. Section 9 gives the overriding effect of the provisions of this Act on any other law or decree or order of any court, tribunal or other authority. Section 10 provides for penalties. It says that any person who is in charge of the management of the area and fails to deliver to the Central Government or the authorised person the possession etc. required under this Act shall be punishable in the manner provided. Section 11 gives protection to the Central Government or the authorised person or any one acting on its behalf for anything done or intended to be done under this Act in good faith. Section 12 contains the rule making power of the Central Government to carry out the provisions of this Act and the manner in which the rules are to be made. Section 13 is the last section of the Act providing for repeal of the earlier Ordinance and savings.

26. The foregoing is a brief resume of the provisions of Act No. 33 of 1993, the constitutional validity of which has to be examined in the light of the grounds of challenge. The meaning of the word "vest" in Section 3 and the kind of vesting contemplated thereby, the effect of vesting including abatement of all pending suits and legal proceedings, according to Section 4, the power of Central Government to direct vesting of the area or any part thereof in another authority or body or trust and its effect according to Section 6, and Section 7 providing for management of property by the Central Government or the authorised person are the provisions of particular significance for deciding the question of constitutionality. Section 8 also is of some significance in this context.

27. We may now proceed to consider the merits of the grounds on which the Act is assailed as constitutionally invalid.

Legislative Competence

28. The legislative competence is traceable to Entry 42, List III and the State of Uttar Pradesh being under President's rule at the relevant time, the legislative competence of the Parliament, in the circumstances, cannot be doubted. That apart, the pith and substance of the legislation is "acquisition of property" and that falls squarely within the ambit of Entry 42, List III. Competing entry set up is Entry 1, List II relating to "public order". "Acquisition of property" and not "public order" is the pith and substance of the statute.

29. In *The State of Bihar* v. *Maharajadhiraja Sir Kameshwar Singh of Darbhanga and Others,* (1952) SCR 889, it was pointed out that where the dominant purpose of the Act was that of transference to the State of the interests of the proprietors and tenure holders of the land, the pith and substance of the legislation was the transference of ownership to the State Government and it was an "acquisition" Act. In *Deputy Commissioner and Collector, Kamrup & Ors.* v. *Durga Nath Sarma,* (1968) 1 SCR 561, Bachawat, J. pointed out that a law for permanent acquisition of property is not a law for promotion of public health etc. since only the taking of temporary possession of private properties can be regarded as a law for promotion of public health.

30. It is significant to bear in mind that Entry 42, List III, as it now exists, was substituted by the Constitution (Seventh Amendment) Act to read as under:

> "Acquisition and requisitioning of property."

Before the Constitution (Seventh Amendment) Act, the relevant entries read as follows:

> "List I, Entry 33:
>
> Acquisition or requisitioning of property for the purposes of the Union.
>
> List II, Entry 36:
>
> Acquisition or requisitioning of property, except for the purposes of the Union, subject to the provisions of Entry 42 of List III.
>
> List III, Entry 42:
>
> Principles on which compensation for property acquired is requisitioned for the purposes of the Union or of a State or for any other public purpose, is to be determined, and the form and the manner in which such compensation is to be given."

By the amendment so made, Entry 42, List III reads as extracted earlier while Entry 33, List I and Entry 36, List II have been omitted. The comprehensive Entry 42 in List III as a result of the Constitution (Seventh Amendment) Act leaves no doubt that an acquisition Act of the kind falls clearly within the ambit of this

Entry and, therefore, the legislative competence of the Parliament to enact this legislation cannot be doubted. This ground of challenge is, therefore, rejected.

Secularism, Right to Freedom of Religion and Right to Equality

31. It would be appropriate now to consider the attack based on secularism which is a basic feature of the Constitution, with the two attendant rights. The argument is that the Act read as a whole is anti-secular being slanted in favour of the Hindu community and against the Muslim minority since it seeks to perpetuate demolition of the mosque which stood on the disputed site instead of providing for the logical just action of rebuilding it, appropriate in the circumstances. It is urged that Section 4(3) provides for abatement of all pending suits and legal proceedings depriving the Muslim community of its defences including that of adverse possession for over 400 years since 1528 AD when the mosque was constructed on that site by Mir Baqi, without providing for an alternate dispute resolution mechanism, and thereby it deprives the Muslim community of the judicial remedy to which it is entitled in the constitutional scheme under the rule of law. It is urged that the Special Reference under Section 143(1) of the Constitution to this Court by the President of India is not of the core question, the answer to which would automatically resolve the dispute but only of a vague and hypothetical issue, the answer to which would not help in the resolution of the dispute as a legal issue. It is also urged that Section 6 enables transfer of the acquired property including the disputed area to any authority, body or trust by the Central Government without reference to the real title over the disputed site. It is further contended that Section 7 perpetuates the mischief of the demolition of the mosque by directing maintenance of the status quo as on 7th January, 1993 which enables the Hindus to exercise the right of worship of some kind in the disputed site keeping the Muslims totally excluded from that area and this discrimination can be perpetuated to any length of time by the Central Government.

The provision in Section 7, it is urged, has the potential of perpetuating this mischief. Reference was also made to Section 8 to suggest that it is meaningless since the question of ownership over the disputed site remains to be decided and with the abatement of all pending suits and legal proceedings, there is no mechanism by which it can be adjudicated. The objection to Section 8 is obviously in the context of the disputed area over which the title is in dispute and not to the remaining area specified in the Schedule to the Act, the ownership of which is not disputed. The validity of acquisition is also challenged by others including those who own some of the acquired properties and in whose case the title is not disputed. Their contention is that acquisition of their property, title to which is undisputed, is unnecessary. Parties to the pending suits which have abated, other than the Sunni Central Wakf Board, have also challenged the validity of the Act, even though on other grounds. Violation of Articles 14, 25 and 26 also is alleged on these grounds. This discussion, therefore, covers these grounds.

32. For a proper consideration of the challenge based on the ground of secularism, it is appropriate to refer to the concept of secularism and the duty of the courts in construing a statute in this context.

33. The polity assured to the people of India by the Constitution is described in the Preamble wherein the word "secular" was added by the 42nd Amendment. It highlights the fundamental rights guaranteed in Articles 25 to 28 that the State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion of their own choice. In brief, this is the concept of secularism as a basic feature of the Constitution of India and the way of life adopted by the people of India as their abiding faith and creed. M.C. Setalvad in Patel Memorial Lectures — 1965, on Secularism, referring to the Indian concept of secularism, stated thus:

> "... The coming of the partition emphasised the great importance of secularism. Notwithstanding the partition, a large Muslim minority, constituting a tenth of the population, continued to be the citizens of independent India.

> There were also other important minority groups of citizens. In the circumstances, a secular constitution for independent India, under which all religions could enjoy equal freedom and all citizens equal rights, and which could weld together into one nation the different religious communities, became inevitable."
>
> (at pages 481-82)
>
> "... The ideal, therefore, of a secular State in the sense of a State which treats all religions alike and displays a benevolent neutrality towards them is in a way more suited to the Indian environment and climate than that of a truly secular State."
>
> (at page 485)
>
> "... Secularism, in the Indian context, must be given the widest possible content. It should connote the eradication of all attitudes and practices derived from or connected with religion which impede our development and retard our growth into an integrated nation. A concerted and earnest endeavour, both by the State and citizen, towards secularisation in accordance with this wide concept alone lead to the stabilisation of our democratic state and the establishment of a true and cohesive Indian nationhood."
>
> (at pages 488-89)

34. A reference to the Address of the President of India, Dr. Shankar Dayal Sharma, as the then Vice-President of India, on "Secularism in the Indian Ethos" while delivering Dr. Zakir Hussain Memorial Lecture of Vishva-Bharati, Shantiniketan, on 29th April, 1989 is useful. Therein, he referred to the difference between our understanding of the word "secular" and that in the West or its dictionary meaning, and said:

> "We in India, however, understand secularism to denote 'Sarva Dharma Samabhaav': an approach of tolerance and understanding of the equality of all religions."
>
> xxx xxx xxx
>
> "This philosophical approach of understanding, co-existence and tolerance is the very spirit of our ancient thought....
>
> xxx xxx xxx
>
> The Yajurveda states:
>
> मित्रस्य मा चक्षुषा सर्वाणि भूतानि समीक्षन्ताम ।
> मित्रस्याहं चक्षुषा सर्वाणि भूतानि समीक्षे ।
> मित्रस्य चक्षुषा समीक्षामहे ॥
>
> यजुः 38 - 18!

"May all beings look on me with the eyes of a friend. May I look on all beings with the eyes of a friend. May I look on all beings with the eyes of a friend. May we look on one another with the eyes of a friend."

A very significant manifestation of secular outlook is contained in the Prithvi Sukta in the Atharva Veda:

जन विभ्रति बहुधा विवाचसम । नानधर्माणं प्रथिवी यथीकसम ।

"This Earth, which accommodates peoples of different persuasions and languages, as in a peaceful home — may it benefit all of us."

ता नः प्रजाः बहुतां समग्रा वाचो मधु प्रथिवि घेहि महयम ।

"Oh, Mother Earth, give to us, as your children the capacity to interact harmoniously; may we speak sweetly with one another."

"एकैव मानुषी जातिः".

And the Rg. Veda emphatically declares:

"All human beings are of one race."

Thus a philosophical and ethnological composite is provided by ancient Indian thought for developing *Sarva Dharma Samabhaav* or secular thought and outlook. This enlightenment is the true nucleus of what is now known as Hinduism.

35. Proceeding further, referring to the impact of other religions on the Indian ethos, he said:

"Two aspects in this regard are noteworthy. First, the initial appearance of Christianity or Islam or Zoroastrianism in India and their establishment on the mainland did not occur as a result of military conquest or threat of conquest. These religions were given a place by virtue of the attitude of accommodation and co-existence displayed by local authorities — including the main religious authorities. The second aspect is even more important: Christianity, Islam and Zoroastrianism brought with them spiritual and humanistic thought harmonious and, in fact, identical to the core ideas of the established religious thought in India as exemplified by the basic beliefs of Vedic, Vedantic, Buddhist and Jain philosophy."

36. The influence of saints and holy persons was indicated thus:

".....There was natural interest, therefore, in Islam as a revealed religion brought forth by a Prophet of profound charisma who had faced adversities, and in Christianity, which spread the light of Jesus Christ who had suffered a terrible crucification for humanity's sake. The Quran moreover referred to great souls such as Abraham, Issac, Ishmael, Jacob, Moses mentioned in the Old Testament of the Christian faith, and Jesus. Al-Fatiha or Fatiha Tu Alfatha which is also referred to as Ummul Quran or

> the essence of the Quran refers to 'Allah' as Rab-ul-Alamin or Lord of the entire universe. It does not confine him to Muslims alone. The Second Surah in the Quran, titled "Al-Baqurah" gives a warning, which is repeated throughout the Quran, that it is not mere professing of one's creed, but righteous conduct, that is true religion. Verses 44, 81 and 82 from this Surah make this absolutely clear."

37. Dr. Sharma also adverted to the contribution made to growth of secularism by Akbar who founded "Din-e-Ilahi" and the support he was given by Abdul Rahim Khane Khana in addition to the secularism of Dara Shikoh. Impact of Muslim mysticism on Hinduism and contribution of Kabir to the Indian ethos has been lasting. Secular ideals led to formation of the Sikh faith and the Gurus have made a lasting contribution to it. He said:

> "Guru Gobind Singh further magnified the secular ideal of the Sikh faith. The following lines composed by Guru Govind Singh come to mind.
>
> देहुरा मसीत सोई, पुजा ओ नमाज ओई
> मानस सभै ऐक पै अनेक को प्रभाव है ।
> अलह अभेख सोई पुरान ओ कुरान ओई
> ए ऐक ही सरूप सभै एक ही बनाव है ।
>
> "Mandir or Mosque, Puja or Namaz, Puran or Quran have no difference. All human beings are equal."

38. After adverting to the significant role of Mahatma Gandhi and Khan Abdul Gaffar Khan in recent times, Dr. Sharma concluded:

> "The Constitution of India specifically articulated the commitment of secularism on the basis of clear understanding of the desirable relationships between the Individual and Religion, between Religion and Religion, Religion and the State, and the State and the Individual...."
>
> xxx xxx xxx
>
> "I shall conclude with a few words, very meaningful words, from a speech by Dr. Zakir Hussain: "We want peace between the individual and groups within nations. These are all vitally interdependent. If the spirit of the Sermon on the Mount, Buddha's philosophy of compassion, the Hindu concept of Ahimsa, and the passion of Islam for obedience to the will of God can combine, then we would succeed in generating the most potent influence for world peace."

39. In *S.R. Bommai* v. *Union of India,* 1994 (3) SCC 1, a nine-Judge Bench referred to the concept of "secularism" in the Indian context. Sawant, J. dealt with this aspect and after referring to the Setalvad Lecture, stated thus:

> "As stated above, religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution. We have accepted the said goal not only because it is our historical legacy and a need of our national unity and integrity but also as a creed of universal brotherhood and humanism. It is our cardinal faith. Any profession and action which go counter to the aforesaid creed are a prima facie proof of the conduct in defiance of the provisions of our Constitution. ...."
>
> (at pages 147-48)

40. Similarly, K. Ramaswamy, J. in the same decision stated:

> "... Though the concept of "secularism" was not expressly engrafted while making the Constitution, its sweep, operation and visibility are apparent from fundamental rights and directive principles and their related provisions. It was made explicit by amending the preamble of the Constitution 42nd Amendment Act. The concept of secularism of which religious freedom is the foremost appears to visualise not only of the subject of God but also an understanding between man and man. Secularism in the Constitution is not anti-God and it is sometimes believed to be a stay in a free society. Matters which are purely religious are left personal to the individual and the secular part is taken charge by the State on grounds of public interest, order and general welfare. The State guarantee individual and corporate religious freedom and dealt with an individual as citizen irrespective of his faith and religious belief and does not promote any particular religion nor prefers one against another. The concept of the secular State is, therefore, essential for successful working of the democratic form of Government. There can be no democracy if anti-secular forces are allowed to work dividing followers of different religious faith flying at each other's throats. The secular Government should negate the attempt and bring order in the society. Religion in the positive sense, is an active instrument to allow the citizen full development of his person, not merely in the physical and material but in the non-material and non-secular life."
>
> (at page 163)

> "... It would thus be clear that Constitution made demarcation between religious part personal to the individual and secular part thereof. The State does not extend patronage to any particular religion, State is neither pro particular religion nor anti particular religion. It stands aloof, in other words maintains neutrality in matters of religion and provides equal protection to

> all religions subject to regulation and actively acts on secular part."
>
> (at page 168)

B.P. Jeevan Reddy, J. in the same context in the decision stated thus:

> "... While the citizens of this country are free to profess, practice and propagate such religion, faith or belief as they choose, so far as the State is concerned, i.e., from the point of view of the State, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally. How is this equal treatment possible, if the State were to prefer or promote a particular religion, race or caste, which necessarily means a less favourable treatment of all other religions, races and castes? How are the constitutional promises of social justice, liberty of belief, faith or worship and equality of status and of opportunity to be attained unless the State eschews the religion, faith or belief of a person from its consideration altogether while dealing with him, his rights, his duties and his entitlements? *Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions.* This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality. This may be a concept evolved by western liberal thought or it may be, as some say, an abiding faith with the Indian people at all points of time. That is not material. *What is material is that it is a constitutional goal and a basic feature of the Constitution* as affirmed in Kesavananda Bharati (1973 (4) SCC 225: 1973 Suppl. SCR 1) and Indira N. Gandhi V. Raj Narain (1975 Suppl. SCC 1: 1976 (2) SCR 347). *Any step inconsistent with this constitutional policy is, in plain words, unconstitutional.* This does not mean that the State has no say whatsoever in matters of religion. Laws can be made regulating the secular affairs of temples, mosques and other places of worships and maths. (See S.P. Mittal Vs. Union of India — 1983 (1) SCC 51:1983(1) SCR 729)."
>
> (emphasis supplied)
>
> (at page 233)

Ahmadi, J. while expressing agreement with the views of Sawant, Ramaswamy and Jeevan Reddy, JJ. stated thus:

> "Notwithstanding the fact that the words 'Socialist' and 'Secular' were added in the Preamble of the Constitution in 1976 by the 42nd Amendment, the concept of secularism was very much embedded in our constitutional philosophy. The term 'Secular' has advisedly not been defined presumably because it is a very elastic term not capable of a precise definition and perhaps best left undefined. By this amendment what was implicit was made explicit...."
>
> (at page 77)

41. It is clear from the constitutional scheme that it guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasising that there is no religion of the State itself. The Preamble of the Constitution read in particular with Articles 25 to 28 emphasises this aspect and indicates that it is in this manner the concept of secularism embodied in the constitutional scheme as a creed adopted by the Indian people has to be understood while examining the constitutional validity of any legislation on the touchstone of the Constitution. The concept of secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution.

42. It is useful in this context to refer to some extracts from a paper on "Law in a Pluralist Society" by M.N. Venkatachaliah, J., as he then was, (one of us). Therein, he said:

> "The purpose of law in plural societies is not the progressive assimilation of the minorities in the majoritarian milieu. This would not solve the problem; but would vainly seek to dissolve it. What then is its purpose? Again in the words of Lord Scarman (Minority Rights in a Plural Society, P.63):
>
>> "... The purpose of law in plural societies is not to extinguish the groups which make the society but to devise political, social and legal means of preventing them from falling apart and so destroying the plural society of which they are members."
>
> "In a pluralist, secular polity law is perhaps the greatest integrating force. A cultivated respect for law and its institutions and symbols; a pride in the country's heritage and achievements; faith that people live under the protection of an adequate legal system are indispensable for sustaining unity in pluralist diversity. Rawlsian pragmatism of "justice as fairness" to serve as an 'over-lapping consensus' and deep seated agreements on fundamental questions of basic structure of society for deeper social unity is a political conception of justice rather than a comprehensive moral conception."
>
> XXX XXX XXX
>
> "What are the limitations on laws dealing with issues of pluralism? Law should not accentuate the depth of the cleavage and become in itself a source of aggravation of the very condition it intends to remedy...."
>
> XXX XXX XXX
>
> "To those that live in fear and insecurity all the joys and bright colours of life are etched away. There is need to provide a reassurance and a sense

> of belonging. It is not enough to say "look here… I never promised you a rose garden. I never promised you perfect justice." But perfect justice may be an unattainable goal. At least it must be a tolerable accommodation of the conflicting interests of society. Though there may really be no "Royal road to attain such accommodations concretely". Bentham alluded to the pursuit of equality as 'Disappointment-preventing' principle as the principle of distributive justice and part of the security-providing principle."

43. Keeping in mind the true concept of secularism, and the role of judiciary in a pluralist society, as also the duty of the court in interpreting such a law, we now proceed to consider the submissions with reference to the provisions of the enactment.

44. It is necessary to first construe the provisions of Act No.33 of 1993 with reference to which the grounds of challenge have to be examined.

45. The meaning of the word "vest" as earlier stated has different shades taking colour from the context in which it is used. It does not necessarily mean absolute vesting in every situation and is capable of bearing the meaning of a limited vesting, being limited, in title as well as duration. Thus the meaning of "vest" used in Section 3 has to be determined in the light of the text of the statute and the purpose of its use. If the vesting be absolute being unlimited in any manner, there can be no limitation on the right to transfer or manage the acquired property. In the event of absolute vesting, there is no need for a provision enabling the making of transfer after acquisition of the property, right to transfer being a necessary incident of absolute title. Enactment of Section 6 in the same statute as a part of the scheme of acquisition of the property vesting it in the Central Government is, therefore, contra indication of the vesting under Section 3 in the Central Government being as an absolute owner without any particular purpose in view. The right to manage and deal with the property in any manner of an absolute owner being unrestricted, enactment of Section 7 which introduces an express limitation on the power of management and administration of property comprising the disputed area till the transfer is effected in the manner indicated in Section 6, is a clear indication of the acquisition of only a limited and not an absolute title in the disputed property by the Central Government. Sections 6 and 7 read together give a clear indication that the acquisition of the disputed property by this Act is for a particular purpose and when the purpose is achieved the property has to be transferred in the manner provided in Section 6; and the Central Government is obliged to maintain the status quo as in existence on 7th January, 1993 at the site where the disputed structure stood, till the time of that transfer. The purpose to be effectuated is evidently the resolution of the dispute which has defied the steps taken for its resolution by negotiations earlier. The modes of resolution of the dispute contemplated are referable to, and connected with, the question referred for the decision of this Court under Article 143(1) of the Constitution. It is a different matter that the dispute may not be capable of resolution merely by answer of the question referred. That is material for deciding the validity of Section 4(3) of the Act which brings about the abatement of all pending suits and legal proceedings indicating that the alternate dispute resolution mechanism adopted is only the Reference made under Article 143(1) of the Constitution.

46. If the Presidential Reference is incapable of satisfying the requirement of alternate dispute resolution mechanism and, therefore, has the effect of denying a judicial remedy to the parties to the suit, this itself may have a bearing on the constitutional validity of Section 4(3) of the Act. In that event Section 4(3) may be rendered invalid resulting in revival of all pending suits and legal proceedings sought to be abated by Section 4(3), the effect being that any transfer by the Central Government of the acquired disputed property under Section 6 would be guided and regulated by the adjudication of the dispute in the revived suits. This is, of course, subject to the severability of Section 4(3).

47. It is, therefore, clear that for ascertaining the true meaning of the word “vest” used in Section 3 we must first consider the validity of Sections 6 and 7 of the Act on which it largely depends. If Sections 6 and 7 of the Act, which limit the title of the Central Government cannot be sustained, the limitation read in Section 3 to the title acquired by the Central Government under the Act through this mode would disappear. For this reason, we proceed to examine the validity of Sections 6 and 7.

48. Between Sections 6 and 7, it is Section 7 which imposes a greater restriction on the power of Central Government. It gives the mandate that in management of the area over which the disputed structure stood, it has to maintain status quo as it existed at the time of acquisition on 7th January, 1993. Such a limitation is clearly inconsistent with the acquisition of absolute ownership of the property. The validity of Section 7(2) of the Act must, therefore, be considered.

49. Section 7 as we read it, is a transitory provision, intended to maintain status quo in the disputed area, till transfer of the property is made by the Central Government on resolution of the dispute. This is to effectuate the purpose of that transfer and to make it meaningful avoiding any possibility of frustration of the exercise as a result of any change in the existing situation in the disputed area during the interregnum. Unless status quo is ensured, the final outcome on resolution of the dispute may be frustrated by any change made in the disputed area which may frustrate the implementation of the result in favour of the successful party and render it meaningless. A direction to maintain status quo in the disputed property is a well-known method and the usual order made during the pendency of a dispute for preserving the property and protecting the interest of the true owner till the adjudication is made. A change in the existing situation is fraught with the danger of prejudicing the rights of the true owner, yet to be determined. This itself is a clear indication that the exercise made is to find out the true owner of the disputed area, to maintain status quo therein during the interregnum and to hand it over to the true owner found entitled to it.

50. The question now is whether the provision in Section 7 containing the mandate to maintain the status quo existing at the disputed site as on 7th January, 1993 is a slant in favour of the Hindu community, intended to perpetuate an injustice done to the Muslim community by demolition of the mosque on 6th December, 1992 and, therefore, it amounts to an anti-secular or discriminatory act rendering the provision unconstitutional. For this purpose it is necessary to recall the situation as it existed on 7th January, 1993 along with the significant events leading to that situation. It is necessary to bear in mind the comparative use of the disputed area and the right of worship practised therein, by the two communities on 7th January, 1993 and for a significant period immediately preceding it. A reference to the comparative user during that period by the two communities would indicate whether the provision in Section 7 directing maintenance of status quo till resolution of the dispute and the transfer by the Central Government contemplated by Section 6 is slanted towards the Hindu community to render the provision violative of the basic feature of secularism or the rights to equality and freedom of religion.

51. As earlier stated, worship by Hindu devotees of the idols installed on the Ram chabutra which stood on the disputed site within the courtyard of the disputed structure had been performed without any objection by the Muslims even prior to the shifting of those idols from the Ram chabutra into the disputed structure in December 1949; in one of the suits filed in January 1950, the trial court passed interim orders whereby the idols remained at the place where they were installed in 1949 and worship of the idols there by the Hindu devotees continued; this interim order was confirmed by the High Court in April 1955; the District Judge ordered the opening of the lock placed on a grill leading to the sanctum-sanctorum of the shrine in the disputed structure on 1st February, 1986 and permitted worship of the idols there to Hindu devotees; and this situation continued till demolition of the structure on 6th December, 1992 when Ram chabutra also was demolished. It was only as a result of the act of demolition on 6th December, 1992 that the worship by the Hindu devotees in general of the idols at that place was interrupted. Since the time of demolition, worship of the idols by a pujari alone is continuing. This is how the right of worship of the idols practised by Hindu devotees for a long time from much prior to 1949 in the Ram chabutra within the disputed site has been interrupted since the act of demolition of 6th December, 1992 restricting the worship of the idols since then to only by one pujari. On the other hand, at least since December 1949, the Muslims have not been offering worship at any place in the disputed site though, it may turn out at the trial of the suits that they had a right to do so.

52. The communal holocaust unleashed in the country disrupting the prevailing communal harmony as a result of the demolition of the structure on 6th December, 1992 is well known to require further mention. Any step taken to arrest escalation of communal tension and to achieve communal accord and harmony can, by no stretch of argumentation, be termed non-secular much less anti-secular or against the concept of secularism — a creed of the Indian people embedded in the ethos.

53. The narration of facts indicates that the acquisition of properties under the Act affects the rights of both the communities and not merely those of the Muslim community. The interest claimed by the Muslims is only over the disputed site where the mosque stood before its demolition. The objection of the Hindus to this claim has to be adjudicated. The remaining entire property acquired under the Act is such over which no title is claimed by the Muslims. A large part thereof comprises of properties of Hindus of which the title is not even in dispute. The justification given for acquisition of the larger area including the property respecting which title is not disputed is that the same is necessary to ensure that the final outcome of adjudication should not be rendered meaningless by the existence of properties belonging to Hindus in the vicinity of the disputed structure in case the Muslims are found entitled to the disputed site. This obviously means that in the event of the Muslims succeeding in the adjudication of the dispute requiring the disputed structure to be handed over to the Muslim community, their success should not be thwarted by denial of proper access to, and enjoyment of rights in, the disputed area by exercise of rights of ownership of Hindu owners of the adjacent properties. Obviously, it is for this reason that the adjacent area has also been acquired to make available to the successful party, that part of it which is considered necessary, for proper enjoyment of the fruits of success on the final outcome of the adjudication. It is clear that one of the purposes of the acquisition of the adjacent properties is the ensurement of the effective enjoyment of the disputed site by the

Muslim community in the event of its success in the litigation; and acquisition of the adjacent area is incidental to the main purpose and cannot be termed unreasonable. The "Manas Bhawan" and "Sita ki Rasoi", both belonging to the Hindus, are buildings which closely overlook the disputed site and are acquired because they are strategic in locations in relation to the disputed area. The necessity of acquiring adjacent temples or religious buildings in view of their proximity to the disputed structure area, which forms a unique class by itself, is permissible. [*See M. Padmanabha Iyengar* v. *Government of Andhra Pradesh & Ors.*, AIR 1990 AP 357 and *Akhara Shri Braham Buta, Amritsar* v. *State of Punjab and Others,* AIR 1989 P&H 198]. We approve the principle stated in these decisions since it serves a larger purpose.

54. However, at a later stage when the exact area acquired which is needed, for achieving the professed purpose of acquisition, can be determined, it would not merely be permissible but also desirable that the superfluous excess area is released from acquisition and reverted to its earlier owner. The challenge to acquisition of any part of the adjacent area on the ground that it is unnecessary for achieving the objective of settling the dispute relating to the disputed area cannot be examined at this stage but, in case the superfluous area is not returned to its owner even after the exact area needed for the purpose is finally determined, it would be open to the owner of any such property to then challenge the superfluous acquisition being unrelated to the purpose of acquisition. Rejection of the challenge on this ground to acquisition at this stage, by the undisputed owners of any such property situate in the vicinity of the disputed area, is with the reservation of this liberty to them. There is no contest to their claim of quashing the acquisition of the adjacent properties by anyone except the Central Government which seeks to justify the acquisition on the basis of necessity. On the construction of the statute made by us, this appears to be the logical, appropriate and just view to take in respect of such adjacent properties in which none other than the undisputed owner claims title and interest.

55. It may also be mentioned that even as Ayodhya is said to be of particular significance to the Hindus as a place of pilgrimage because of the ancient belief that Lord Rama was born there, the mosque was of significance for the Muslim community as an ancient mosque built by Mir Baqi in 1528 AD. As a mosque, it was a religious place of worship by the Muslims. This indicates the comparative significance of the disputed site to the two communities and also that the impact of acquisition is equally on the right and interest of the Hindu community. Mention of this aspect is made only in the context of the argument that the statute as a whole, not merely Section 7 thereof, is anti-secular being slanted in favour of the Hindus and against the Muslims.

56. Section 7(2) of the Act freezes the situation admittedly in existence on 7th January, 1993 which was a lesser right of worship for the Hindu devotees than that in existence earlier for a long time till the demolition of the disputed structure on 6th December, 1992; and it does not create new situation more favourable to the Hindu community amounting to conferment on them of a larger right of worship in the disputed site than that practised till 6th December, 1992. Maintenance of status quo as on 7th January, 1993 does not, therefore, confer or have the effect of granting to the Hindu community any further benefit thereby. It is also pertinent to bear in mind that the persons responsible for demolition of the mosque on 6th December, 1992 were some miscreants who cannot be identified and equated with the entire Hindu community and, therefore, the act of vandalism so perpetrated by the miscreants cannot be treated as an act of the entire Hindu community for the purpose of adjudging the constitutionality of the enactment. Strong reaction against, and condemnation by the Hindus of the demolition of the structure in general bears eloquent testimony to this fact. Rejection of Bharatiya Janata Party at the hustings in the subsequent elections in Uttar Pradesh is another circumstance to that effect. The miscreants who demolished the mosque had no religion, caste or creed except the character of a criminal and the mere incident of birth of such a person in any particular community cannot attach the stigma of his crime to the community in which he was born.

57. Another effect of the freeze imposed by Section 7(2) of the

Act is that it ensures that there can be no occasion for the Hindu community to seek to enlarge the scope of the practice of worship by them as on 7th January, 1993 during the interregnum till the final adjudication on the basis that in fact a larger right of worship by them was in vogue upto 6th December, 1992. It is difficult to visualise how Section 7(2) can be construed as a slant in favour of the Hindu community and, therefore, anti-secular. The provision does not curtail practice of right of worship of the Muslim community in the disputed area, there having been de facto no exercise of the practice or worship by them there at least since December 1949; and it maintains status quo by the freeze to the reduced right of worship by the Hindus as in existence on 7th January, 1993. However, confining exercise of the right of worship of the Hindu community to its reduced form within the disputed area as on 7th January, 1993, lesser than that exercised till the demolition on 6th December, 1992, by the freeze enacted in Section 7(2) appears to be reasonable and just in view of the fact that the miscreants who demolished the mosque are suspected to be persons professing to practice the Hindu religion. The Hindu community must, therefore, bear the cross on its chest, for the misdeed of the miscreants reasonably suspected to belong to their religious fold.

58. This is the proper perspective, we say, in which the statute as a whole and Section 7 in particular must be viewed. Thus the factual foundation for challenge to the statute as a whole and Section 7(2) in particular on the ground of secularism, a basic feature of the Constitution, and the rights to equality and freedom of religion is non-existent.

59. Reference may be made to the statements of the Central Government soon after the demolition on 7th December, 1992 and 27th December, 1992 wherein it was said that the mosque would be rebuilt. It was urged that the action taken on 7th January, 1993 to issue an Ordinance, later replaced by the Act, and simultaneously to make the Reference to this Court under Article 143(1) of the Constitution amounts to resiling from the earlier statements for the benefit of the Hindu community. It is sufficient to say that the earlier statements so made cannot limit the power of the Parliament and are not material for adjudging the constitutional validity of the enactment. The validity of the statute has to be determined on the touchstone of the Constitution and not any statements made prior to it. We have therefore no doubt that Section 7 does not suffer from the infirmity of being anti-secular or discriminatory to render it unconstitutional.

60. We would now examine the validity of Section 6. Sub-section (1) of Section 6 empowers the Central Government to direct vesting of the area acquired or any part thereof in another authority or body or trust. This power extends to the entire acquired area or any part thereof. This is notwithstanding anything contained in Sections 3, 4, 5 and 7. Section 3 provides for acquisition of the area and its vesting in the Central Government. It is, therefore, made clear by sub-section (1) of Section 6 that the acquisition of the area and its vesting in the Central Government is not a hindrance to the same being vested thereafter by the Central Government in another authority or body or trust. Section 4 relates to the effect of vesting and Section 5 to the power of the Central Government to secure possession of the area vested, with the corresponding obligation of the person or the State Government in possession thereof to deliver it to the Central Government or the authorised person. Section 4(3) relating to abatement of pending suits and legal proceedings would be considered separately. Section 7 which we have already upheld, relates to management and administration of the property by the Central Government or the authorised person during the interregnum till the exercise of power by the Central Government under Section 6(1). Section 7 has been construed by us as a transitory provision to maintain status quo in the disputed area and for proper management of the entire property acquired during the interregnum. Thus, sub-section (1) of Section 6 read with sub-section (2) of Section 7 is an in-built indication in the statute of the intent that acquisition of the disputed area and its vesting in the Central Government is not absolute but for the purpose of its subsequent transfer to the person found entitled to it as a result of adjudication of the dispute for the resolution of which this step was taken, and enactment of the statute is part of that exercise. Making of the Reference under Article 143(1) simultaneously with the issuance of Ordinance, later replaced by the Act, on the same day also is an indication of the legislative intent that the acquisition of the disputed area was not meant to be absolute but limited to holding it as a statutory receiver till resolution of the dispute; and then to transfer it, in accordance with, and in terms of the final determination made in the mechanism adopted for resolution of the dispute. Sub-section (2) of Section 6 indicates consequence of the action taken under sub-section (1) by providing that as a result of action taken under sub-section (1), any right, title and interest in relation to the area or part thereof would be deemed to have become those of the transferee. Sub-section (3) of Section 6 enacts that the provisions of Sections 4, 5, 7 and 11 shall, so far as may be, apply in relation to such authority or body or trustees as they apply in relation to the Central Government. The expression ''so far as may be'' is indicative of the fact that all or any of these provisions may or may not be applicable to the transferee under sub-section (1). This provides for the situation of transfer being made, if necessary, at any stage and of any part of the property, since Section 7(2) is applicable only to the disputed area. The provision however does not countenance the dispute remaining unresolved or the situation continuing perpetually. The embargo on transfer till adjudication, and in terms thereof, to be read in Section 6(1), relates only to the disputed area, while transfer of any part of the excess area, retention of which till adjudication of the dispute relating to the disputed area may not be necessary, is not inhibited till then, since the acquisition of the excess area is absolute subject to the duty to restore it to the owner if its retention is found, to be unnecessary, as indicated. The meaning of the word ''vest'' in Sections 3 and 6 has to be so construed differently in relation to the disputed area and the excess area in its vicinity.

61. Acquisition of the adjacent undisputed area belonging to Hindus has been attacked on the ground that it was unnecessary since ownership of the same is undisputed. Reason for acquisition of the larger area adjacent to the disputed area has been indicated. It is, therefore, not unrelated to the resolution of the dispute which is the reason for the entire acquisition. Even though, prima facie, the acquisition of the adjacent area in respect of which there is no dispute of title and which belongs to Hindus may appear to be a slant against the Hindus, yet on closer scrutiny it is not so since it is for the larger national purpose of maintaining and promoting communal harmony and in consonance with the creed of secularism. Once it is found that it is permissible to acquire an area in excess of the disputed area alone, adjacent to it, to effectuate the purpose of acquisition of the disputed area and to implement the outcome of the final adjudication between the parties to ensure that in the event of success of the Muslim community in the dispute their success remains meaningful, the extent of adjacent area considered necessary is in the domain of policy and not a matter for judicial scrutiny or a ground for testing the constitutional validity of the enactment, as earlier indicated. However, it is with the caveat of the Central Government's duty to restore it to its owner, as indicated earlier, if it is found later to be unnecessary; and reservation of liberty to the owner to challenge the needless acquisition when the total need has been determined.

62. We find no infirmity in Section 6 also to render it unconstitutional.

63. The status of the Central Government as a result of vesting by virtue of Section 3 of the Act is, therefore, of a statutory receiver in relation to the disputed area, coupled with a duty to manage and administer the disputed area maintaining status quo therein till the final outcome of adjudication of the long-standing dispute relating to the disputed structure at Ayodhya. Vesting in the Central Government of the area in excess of the disputed area, is, however, absolute. The meaning of "vest" has these different shades in Sections 3 and 6 in relation to the two parts of the entire area acquired by the Act.

64. The question now is of the mode of adjudication of the dispute, on the final outcome of which the action contemplated by Section 6(1) of the Act of effecting transfer of the disputed area has to be made by the Central Government.

65. Sub-section (3) of Section 4 provides for abatement of all pending suits and legal proceedings in respect of the right, title and interest relating to any property which has vested in the Central Government under Section 3. The rival claims to the disputed area which were to be adjudicated in the pending suits can no longer be determined therein as a result of the abatement of the suits. This also results in extinction of the several defences raised by the Muslim community including that of adverse possession of the disputed area for over 400 years since construction of the mosque there in 1528 AD by Mir Baqi. Ostensibly, the alternate dispute resolution mechanism adopted is that of a simultaneous Reference made the same day under Article 143(1) of the Constitution to this Court for decision of the question referred. It is clear from the issues framed in those suits that the core question for determination in the suits is not covered by the Reference made, and it also does not include therein the defences raised by the Muslim community. It is also clear that the answer to the question referred, whatever it may be, will not lead to the answer of the core question for determination in the pending suits and it will not, by itself, resolve the long-standing dispute relating to the disputed area. Reference made under Article 143(1) cannot, therefore, be treated as an effective alternate dispute resolution mechanism in substitution of the pending suits which are abated by Section 4(3) of the Act. For this reason, it was urged, that the abatement of pending suits amounts to denial of the judicial remedy available to the Muslim community for resolution of the dispute and grant of the relief on that basis in accordance with the scheme of redress under the rule of law envisaged by the Constitution. The validity of sub-section (3) of Section 4 is assailed on this ground.

66. To appreciate the stand of the Central Government on this point, we permitted the learned Solicitor General to make a categorical statement for the Union of India in this behalf. The final statement made by the learned Solicitor General of India in writing dated 14.9.1994 forming a part of the record, almost at the conclusion of the hearing, also does not indicate that the answer to the question referred would itself be decisive of the core question in controversy between the parties to the suits relating to the claim over the disputed site. According to the statement, the Central Government proposes to resort to a process of negotiation between the rival claimants after getting the answer to the question referred, and if the negotiations fail, then to adopt such course as it may find appropriate in the circumstances. There can be no doubt, in these circumstances, that the Special Reference made under Article 143(1) of the Constitution cannot be construed as an effective alternative dispute resolution mechanism to permit substitution of the pending suits and legal proceedings by the mode adopted of making this Reference. In our opinion, this fact alone is sufficient to invalidate sub-section (3) of Section 4 of the Act. [*See Smt. Indira Nehru Gandhi/Shri Raj Narain* v. *Shri Raj Narain/Smt. Indira Nehru Gandhi,* 1975 (Supp.) SCC 1]. We accordingly declare sub-section (3) of Section 4 to be unconstitutional. However, sub-section (3) of Section 4 is severable, and, therefore, its invalidity is not an impediment to the remaining statute being upheld as valid.

67. There is no serious challenge to the validity of any other provision of the Act except a feeble attack on Section 8. For Section 8, it was urged, that performance of the exercise of payment of compensation thereunder would be impractical in respect of the property of which ownership is in dispute. This argument itself does not visualise any such difficulty in respect of the remaining undisputed property. In the view we have taken that the vesting in the Central Government by virtue of Section 3 in relation to the disputed area is only as a statutory receiver, and Section 4(3) being declared invalid results in revival of the pending suits and legal proceedings, the application of Section 8 would present no difficulty. Section 8 is meant only for the property acquired absolutely, other than the disputed area, being adjacent to, and in the vicinity of the disputed area. The disputed area being taken over by the Central Government only as a statutory receiver, there is no question of payment of compensation for the same as it is meant to be handed over to the successful party in the suits, in terms of the ultimate judicial verdict therein, for the faithful implementation of the judicial decision. The exercise of the power under Section 6, by the Central Government is to be made only then in respect of the disputed area, in accordance with the final judicial decision, preserving status quo therein in terms of Section 7(2) till then. No further discussion of this aspect is necessary.

68. A construction which the language of the statute can bear and promotes a larger national purpose must be preferred to a strict literal construction tending to promote factionalism and discord.

Mosque — Immunity from Acquisition

69. A larger question raised at the hearing was that there is no power in the State to acquire any mosque, irrespective of its significance to practice of the religion of Islam. The argument is that a mosque, even if it is of no particular significance to the practice of religion of Islam, cannot be acquired because of the special status of a mosque in Mahomedan Law. This argument was not confined to a mosque of particular significance without which right to practice the religion is not conceivable because it may form an essential and integral part of the practice of Islam. In the view that we have taken of limited vesting in the Central Government as a statutory receiver of the disputed area in which the mosque stood, for the purpose of handing it over to the party found entitled to it, and requiring it to maintain status quo therein till then, this question may not be of any practical significance since there is no absolute divesting of the true owner of that property. We may observe that the proposition advanced does appear to us to be too broad for acceptance inasmuch as it would restrict the sovereign power of acquisition even where such acquisition is essential for an undoubted national purpose, if the mosque happens to be located in the property acquired as an ordinary place of worship without any particular significance attached to it for the practice of Islam as a religion. It would also lead to the strange result that in secular India there would be discrimination against the religions, other than Islam. In view of the vehemence with which this argument was advanced by Dr. Rajeev Dhawan and Shri Abdul Mannan to contend that the acquisition is invalid for this reason alone, it is necessary for us to decide this question.

70. It has been contended that acquisition of a mosque violates the right given under Articles 25 and 26 of the Constitution of India. This requires reference to the status of a mosque under the Mohammedan Law.

71. Even prior to the Constitution, places of worship had enjoyed a special sanctity in India. In order to give special protection to places of worship and to prevent hurting the religious sentiments of followers of different religions in British India, Chapter XV of the Indian Penal Code, 1860 was enacted. This Chapter exclusively deals with the offences relating to religion in Sections 295, 295 A, 296, 297 and 298 of the Indian Penal Code. Lord Macaulay in drafting the Indian Penal Code, had indicated the principle on which it was desirable for all governments to act and the British Government in India could not depart from it without risking the disintegration of society. The danger of ignoring the religious sentiments of the people of India which could lead to spread of dissatisfaction throughout the country was also indicated.

72. In British India, the right to worship of Muslims in a mosque and Hindus in a temple had always been recognised as a civil right. Prior to 1950, the Indian Courts in British India had maintained the balance between the different communities or sects in respect of their right of worship.

73. Even prior to the guarantee of freedom of religion in the Constitution of India, Chief Justice Turner in *Muthialu Chetti & Ors.* v. *Bapun Saib,* ILR 2 Madras 140, had held that during the British Administration all religions were to be treated equally with the State maintaining neutrality having regard to public welfare. In *Sundram Chetti & Ors.* v. *The Queen,* ILR 6 Madras 203 (FB) approving ILR 2 Madras 140, Chief Justice Turner said:

> "... But with reference to these and to other privileges claimed on the ground of caste or creed, I may observe that they had their origin in times when a State religion influenced the public and private law of the country, and are hardly compatible with the principles which regulate British administration, the equal rights of all citizens and the complete neutrality of the State in matters of religion.... When anarchy or absolutism yield place to well ordered liberty, change there must be, but change in a direction which should command the assent of the intelligence of the country."
>
> (at page 217)

74. In *Mosque known as Masjid Shahid Ganj and Others* v. *Shiromani Gurdwara Prabandhak Committee, Amritsar,* AIR 1938 Lahore 369, it was held that where a mosque has been adversely possessed by non-Muslims, it lost its sacred character as mosque. Hence, the view that once a consecrated mosque, it remains always a place of worship as a mosque was not the Mohammedan Law of India as approved by Indian Courts. It was further held by the majority that a mosque in India was an immovable property and the right of worship at a particular place is lost when the right to property on which it stands is lost by adverse possession. The conclusion reached in the minority judgement of Din Mohd., J. is not the Mohammedan Law of British India. The majority view expressed by the learned Chief Justice of Lahore High Court was approved by the Privy Council in AIR 1940 PC 116, in the appeal against the said decision of the Lahore High Court. The Privy Council held:

> "... It is impossible to read into the modern Limitation Acts any exception for property made wakf for the purposes of mosque whether the purpose be merely to provide money for the upkeep and conduct of a mosque or to provide a site and building for the purpose. While their Lordships have every sympathy with the religious sentiment which would ascribe sanctity and inviolability to a place of worship, they cannot under the Limitation Act accept the contentions that such a building cannot be possessed adversely to the wakf, or that it is not so possessed so long as it is referred to as "mosque" or unless the building is razed to the ground or loses the appearance which reveals its original purpose."
>
> (at page 121)

75. It may also be indicated that the Land Acquisition Act, 1894 is applicable uniformly to all properties including places of worship. Right of acquisition thereunder was guided by the express provisions of the Land Acquisition Act, 1894 and executive instructions were issued to regulate acquisition of places of worship. Clause 102 of the Manual of Land Acquisition of the State of Maharashtra which deals with the acquisition of religious places like churches, temples and mosques, is of significance in this context.

76. The power of acquisition is the sovereign or prerogative power of the State to acquire property. Such power exists independent of Article 300A of the Constitution or the earlier Article 31 of the Constitution which merely indicate the limitations on the power of acquisition by the State. The Supreme Court from the beginning has consistently upheld the sovereign power of the State to acquire property. B.K. Mukherjee, J. (as he then was) held in *Chiranjitlal Chowdhuri* v. *The Union of India and Others* (1950 SCR 869 at pages 901-902) as under:

> "It is a right inherent in every sovereign to take and appropriate private property belonging to individual citizens for public use. This right, which is described as eminent domain in American law, is like the power of taxation, an offspring of political necessity, and it is supposed to be based upon an implied reservation by Government that private property acquired by its citizens under its protection may be taken or its use controlled for public benefit irrespective of the wishes of the owner...."

77. Patanjali Sastri, C.J., in the *State of West Bengal* v. *Subodh Gopal Bose and Others* (1954 SCR 587 at page 605) held as under:

> "...and among, such powers was included the power of "acquisition or requisitioning of property" for Union and State purposes in entry No.33 of List I and No. 36 of List II respectively. Thus, what is called the power of eminent domain, which is assumed to be inherent in the sovereignty of the State according to Continental and American jurists and is accordingly not expressly provided for in the American Constitution, is made the subject of an express grant in our Constitution...."

78. It appears from various decisions rendered by this Court, referred later, that subject to the protection under Articles 25 and 26 of the Constitution, places of religious worship like mosques, churches, temples etc. can be acquired under the State's sovereign power of acquisition. Such acquisition per se does not violate either Article 25 or Article 26 of the Constitution. The decisions relating to taking over of the management have no bearing on the sovereign power of the State to acquire property.

79. Khajamian Wakf Estates etc. v. *State of Madras and Another,* 1971(2) SCR 791 at page 797, has held:

> "It was next urged that by acquiring the properties belonging to religious denominations the legislature violated Art. 26(c) and (d) which provide that religious denominations shall have the right to own and acquire movable and immovable property and administer such property in accordance with law. These provisions do not take away the right of the State to acquire property belonging to religious denominations. Those denominations can own or acquire properties and administer them in accordance with law. That does

> not mean that the property owned by them cannot be acquired. As a result of acquisition they cease to own that property. Thereafter their right to administer that property ceases because it is no longer their property. Article 26 does not interfere with the right of the State to acquire property."

80. *Acharaya Maharajshri Narandra Prasadji Anand Prasadji Maharaj etc. etc.* v. *The State of Gujarat and Others,* 1975 (2) SCR 317 at pages 327-328, has held:

> "... One thing is, however, clear that Article 26 guarantees inter alia the right to own and acquire movable and immovable property for managing religious affairs. This right, however, cannot take away the right of the State to compulsorily acquire property... *If, on the other hand, acquisition of property of a religious denomination by the State can be proved to be such as to destroy or completely negative· its right to own and acquire movable and immovable property for even the survival of a religious institution the question may have to be examined in a different light."*
>
> (emphasis supplied)

81. It may be noticed that Article 25 does not contain any reference to property unlike Article 26 of the Constitution. The right to practice, profess and propagate religion guaranteed under Article 25 of the Constitution does not necessarily include the right to acquire or own or possess property. Similarly this right does not extend to the right to worship at any and every place of worship so that any hindrance to worship at a particular place per se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution. The protection under Articles 25 and 26 of the Constitution is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion.

82. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially.

83. A five-judge Full Bench of the Allahabad High Court, in *Raja Suryapalsingh & Others* v. *The U.P. Govt.*, AIR 1951 All. 674, held:

> "Arguments have been advanced by learned counsel on behalf of certain waqfs & Hindu religious institutions based on Articles 25(1) & 26, cl. (c) of the Constitution....
>
> It is said that a mutawalli's right to profess his religion is infringed if the waqf property is compulsorily acquired, but the acquisition of that property under Art. 31 (to which the right conferred by Art. 25 is expressly subject) has nothing to do with such rights & in no way interferes with this exercise."
>
> (at page 690)

84. It has been contended that a mosque enjoys a particular position in Muslim Law and once a mosque is established and prayers are offered in such a mosque, the same remains for all time to come a property of Allah and the same never reverts back to the donor or founder of the mosque and any person professing Islamic faith can offer prayer in such a mosque and even if the structure is demolished, the place remains the same where the Namaz can be offered. As indicated hereinbefore, in British India, no such protection was given to a mosque and the mosque was subjected to the provisions of statute of limitation thereby extinguishing the right of Muslims to offer prayers in a particular mosque lost by adverse possession over that property.

85. Section 3(26) of the General Clauses Act comprehends the categories of properties known to Indian Law. Article 367 of the Constitution adopts this secular concept of property for purposes of our Constitution. A temple, church or mosque etc. are essentially immovable properties and subject to protection under Articles 25 and 26. Every immovable property is liable to be acquired. Viewed in the proper perspective, a mosque does not enjoy any additional protection which is not available to religious places of worship of other religions.

86. The correct position may be summarised thus. Under the Mohammedan Law applicable in India, title to a mosque can be lost by adverse possession (*See* Mulla's Principles of Mohammedan Law, 19th Edn. by M. Hidaytullah — Sec.217; and AIR 1940 PC 116). If that is the position in law, there can be no reason to hold that a mosque has a unique or special status, higher than that of the places of worship of other religions in secular India to make it immune from acquisition by exercise of the sovereign or prerogative power of the State. A mosque is not an essential part of the practice of the religion of Islam and Namaz (prayer) by Muslims can be offered anywhere, even in open. Accordingly, its acquisition is not prohibited by the provisions in the Constitution of India. Irrespective of the status of a mosque in an Islamic country for the purpose of immunity from acquisition by the State in exercise of the sovereign power, its status and immunity from acquisition in the secular ethos of India under the Constitution is the same and equal to that of the places of worship of the other religions, namely, church, temple etc. It is neither more nor less than that of the places of worship of the other religions. Obviously, the acquisition of any religious place is to be made only in unusual and extraordinary situations for a larger national purpose keeping in view that such acquisition should not result in extinction of the right to practice the religion, if the significance of that place be such. Subject to this condition, the power of acquisition is available for a mosque like any other place of worship of any religion. The right to worship is not at any and every place, so long as it can be practised effectively, unless the right to worship at a particular place is itself an integral part of that right.

Maintainability of the Reference

87. In the view that we have taken on the question of validity of the statute (Act No.33 of 1993) and as a result of upholding the validity of the entire statute, except Section 4(3) thereof, resulting in revival of the pending suits and legal proceedings wherein the dispute between the parties has to be adjudicated, the Reference made under Article 143(1) becomes superfluous and unnecessary. For this reason, it is unnecessary for us to examine the merits of the submissions made on the maintainability of this Reference. We, accordingly, very respectfully decline to answer the Reference and return the same.

Result

88. The result is that all the pending suits and legal proceedings stand revived, and they shall be proceeded with, and decided, in accordance with law. It follows further as a result of the remaining enactment being upheld as valid that the disputed area has vested in the Central Government as a statutory receiver with a duty to manage and administer it in the manner provided in the Act maintaining status quo therein by virtue of the freeze enacted in Section 7(2); and the Central Government would exercise its power of vesting that property further in another authority or body or trust in accordance with Section 6(1) of the Act in terms of the final adjudication in the pending suits. The power of the courts in the pending legal proceedings to give directions to the Central Government as a statutory receiver would be circumscribed and limited to the extent of the area left open by the provisions of the Act. The Central Government would be bound to take all necessary steps to implement the decision in the suits and other legal proceedings and to hand over the disputed area to the party found entitled to the same on the final adjudication made in the suits. The parties to the suits would be entitled to amend their pleadings suitably in the light of our decision.

89. Before we end, we would like to indicate the consequence if the entire Act had been held to be invalid and then we had declined to answer the Reference on that conclusion. It would then result in revival of the abated suits along with all the interim orders made therein. It would also then result automatically in revival of the worship of the idols by Hindu devotees, which too has been stopped from December 1992, with all its ramifications without granting any benefit to the Muslim community whose practice of worship in the mosque (demolished on 6th December, 1992) had come to a stop, for whatever reason, since at least December 1949. This situation, unless altered subsequently by any court order in the revived suits, would, therefore, continue during the pendency of the litigation. This result could be no solace to the Muslims whose feelings of hurt as a result of the demolition of mosque, must be assuaged in the manner best possible without giving cause for any legitimate grievance to the other community leading to the possibility of reigniting communal passions detrimental to the spirit of communal harmony in a secular state.

90. The best solution in the circumstances, on revival of suits is, therefore, to maintain status quo as on 7th January, 1993 when the law came into force modifying the interim orders in the suits to that extent by curtailing the practice of worship by Hindus in the disputed area to the extent it stands reduced under the Act instead of conferring on them the larger right available under the court orders till intervention was made by legislation.

91. Section 7(2) achieves this purpose by freezing the interim arrangement for worship by Hindu devotees reduced to this extent and curtails the larger right they enjoyed under the court orders, ensuring that it cannot be enlarged till final adjudication of the dispute and consequent transfer of the disputed area to the party found entitled to the same. This being the purpose and true effect of Section 7(2), it promotes and strengthens the commitment of the nation to secularism instead of negating it. To hold this provision as anti-secular and slanted in favour of the Hindu community would be to frustrate an attempt to thwart anti-secularism and unwittingly support the forces which were responsible for the events of 6th December, 1992.

General

92. Some general remarks are appropriate in the context. We must place on record our appreciation and gratitude to the learned members of the Bar who assisted us at the hearing of this matter of extraordinary and unusual importance to the national ethos. The learned Attorney General, the learned Solicitor General, the learned Advocate General of Madhya Pradesh, the learned Advocate General of Rajasthan, Shri F.S. Nariman, Shri Soli J. Sorabjee, Late Shri R.K. Garg, Dr. Rajeev Dhawan, Shri Anil B. Divan, Shri Satish Chandra, Shri P.P. Rao, Shri Abdul Mannan, Shri O.P. Sharma, Shri S.N. Mehta, Shri P.N. Duda, Shri V.M. Tarkunde, Shri Ashok H. Desai, Shri Shakil Ahmed Syed, Ms. N. Bhagwat and the other learned counsel who assisted them rendered their valuable assistance with great zeal after considerable industry in the highest traditions of the Bar. Shri Deoki Nandan Agarwal, one of the parties in a suit as the next friend of the Deity appeared in person and argued with complete detachment. Dr. M. Ismail Faruqui also appeared in person. It was particularly heartening to find that the cause of the Muslim community was forcefully advocated essentially by the members of the Bar belonging to other communities. Their commitment to the cause is evident from the fact that Shri Abdul Mannan who appeared for the Sunni Central Wakf Board endorsed the arguments on behalf of the Muslim community. The reciprocal gesture of Shri Mannan was equally heartening and indicative of mutual trust. The congenial atmosphere in which the entire hearing took place was a true manifestation of secularism in practice.

93. The hearing left us wondering why the dispute cannot be resolved in the same manner and in the same spirit in which the matter was argued, particularly when some of the participants are common and are in a position to negotiate and resolve the dispute. We do hope this hearing has been the commencement of that process which will ensure an amicable resolution of the dispute and it will not end with the hearing of this matter. This is a matter suited essentially to resolution by negotiations which does not end in a winner and a loser while adjudication leads to that end. It is in the national interest that there is no loser at the end of the process adopted for resolution of the dispute so that the final outcome does not leave behind any rancour in anyone. This can be achieved by a negotiated solution on the basis of which a decree can be obtained in terms of such solution in these suits. Unless a solution is found which leaves everyone happy, that cannot be the beginning for continued harmony between "we the people of India".

94. In 1893 World's Parliament of Religions was held in Chicago. The Chairman of the Parliament John Henry Barrows indicated its object and observed, "It was felt to be wise and advantageous that the religions of the world, which are competing at so many points in all the continents, should be brought together not for contention but for loving conference, in one room." In the Parliament, Swami Vivekananda spoke of 'Hinduism as the religion that has taught the world both tolerance and universal acceptance' and described the diversity of religions as "the same light coming through different colors." The assembly recited the Lord's Prayer as a universal prayer and Rabbi Emil Hirsch proclaimed, "The day of national religions is past. The God of the universe speaks of all mankind." At the closing session, Chicago lawyer Charles Bonney, one of the Parliament's Chief visionaries, declared, "Henceforth the religions of the world will make war, not on each other, but on the giant evils that afflict mankind." Have we, during the last century, moved towards the professed goal?

> "As 1993 began, communal violence returned to India, sparked by the Controversy over a 16th-century mosque said to stand on the ruins of an ancient Hindu temple honoring Lord Rama." It may be said that 'fundamentalism and pluralism pose the two challenges that people of all religious traditions face'; and "to the fundamentalists, the borders of religious certainty are tightly guarded; to the pluralist, the borders are good fences where one meets the neighbor. To many fundamentalists, secularism, seen as the denial of religious claims, is the enemy; to pluralists, secularism, seen as the separation of government from the domination of a single religion, is the essential concomitant of religious diversity and the protection of religious freedom." The present state may be summarised thus: "At present, the greatest religious tensions are not those between any one religion and another; they are the tensions between the fundamentalist and the pluralist in each and every religious tradition." The spirit of universalism popular in the late 19th century was depicted by Max Muller who said, "The living kernel of religion can be found, I believe, in almost every creed, however much the husk may vary. And think what that means. It means that above and beneath and behind all religions there is one eternal, one universal religion."

96. The year 1993 has been described as the "Year of Interreligious Understanding and Cooperation." Is that century old spirit of conciliation and cooperation reflected in reactions of the protagonists of different religious faiths to justify 1993 being called the "Year of Interreligious Understanding and Cooperation"? ("Reflections on Religious Diversity" by Diana L. Eck in *SPAN* — September 1994). It is this hope which has to be realised in the future.

97. A neutral perception of the requirement for communal harmony is to be found in the Baha'i faith. In a booklet, "Communal Harmony — India's Greatest Challenge", forming part of the Baha'i literature, it is stated thus:

> "... The spirit of tolerance and assimilation are the hall marks of this civilization. Never has the question of communal harmony and social integration raised such a wide range of emotions as today...."
>
> XXX XXX XXX
>
> "Fear, suspicion and hatred are the fuel which feed the flame of communal disharmony and conflict. Though the Indian masses would prefer harmony between various communities, it cannot be established through the accommodation 'separate but equal', nor through the submergence of *minority culture into majority culture* — whatever that may be...."
>
> "Lasting harmony between heterogeneous communities can only come through a recognition of the oneness of mankind, a realization that differences that divide us along ethnic and religious lines have no foundation. Just as there are no boundaries drawn on the earth of separate nations, distinctions of social, economic, ethnic and religious identity imposed by peoples are artificial; they have only benefited those with vested interests. On the other hand, naturally occurring diverse regions of the planet, or the country, such as mountain and plains, each have unique benefits. The diversity created by God has infinite value, while distinctions imposed by man have no substance."

98. We conclude with the fervent hope that communal harmony, peace and transquility would soon descend in the land of Mahatma Gandhi, Father of the Nation, whose favourite bhajan (hymn) was

"ईश्वर अल्लाह तेरे नाम
सबको सन्मति दे भगवान ।"

"Ishwar and Allah are both your names,
Oh God, Grant this wisdom to all."

99. We do hope that the people of India would remember the gospel he preached and practised, and live up to his ideals. "Better late than never".

Conclusions

100. As a result of the above discussion, our conclusions, to be read with discussion, are as follows:

(1) (a) Sub-section (3) of Section 4 of the Act abates all

pending suits and legal proceedings without providing for an alternative dispute resolution mechanism for resolution of the dispute between the parties thereto. This is an extinction of the judicial remedy for resolution of the dispute amounting to negation of rule of law. Sub-section (3) of Section 4 of the Act is, therefore, unconstitutional and invalid.

(1) (b) The remaining provisions of the Act do not suffer from any invalidity on the construction made thereof by us. Sub-section (3) of Section 4 of the Act is severable from the remaining Act. Accordingly, the challenge to the constitutional validity of the remaining Act, except for sub-section (3) of Section 4, is rejected.

(2) Irrespective of the status of a mosque under the Muslim law applicable in the Islamic countries, the status of a mosque under the Mohammedan Law applicable in secular India is the same and equal to that of any other place of worship of any religion; and it does not enjoy any greater immunity from acquisition in exercise of the sovereign or prerogative power of the State, than that of the places of worship of the other religions.

(3) The pending suits and other proceedings relating to the disputed area within which the structure (including the premises of the inner and outer courtyards of such structure), commonly known as the Ram Janma Bhumi-Babri Masjid, stood, stand revived for adjudication of the dispute therein, together with the interim orders made, except to the extent the interim orders stand modified by the provisions of Section 7 of the Act.

(4) The vesting of the said disputed area in the Central Government by virtue of Section 3 of the Act is limited, as a statutory receiver, with the duty for its management and administration according to Section 7 requiring maintenance of status quo therein under sub-section (2) of Section 7 of the Act. The duty of the Central Government as the statutory receiver is to hand over the disputed area in accordance with Section 6 of the Act, in terms of the adjudication made in the suits for implementation of the final decision therein. This is the purpose for which the disputed area has been so acquired.

(5) The power of the courts in making further interim orders

in the suits is limited to, and circumscribed by, the area outside the ambit of Section 7 of the Act.

(6) The vesting of the adjacent area, other than the disputed area, acquired by the Act in the Central Government by virtue of Section 3 of the Act is absolute with the power of management and administration thereof in accordance with sub-section (1) of Section 7 of the Act, till its further vesting in any authority or other body or trustees of any trust in accordance with Section 6 of the Act. The further vesting of the adjacent area, other than the disputed area, in accordance with Section 6 of the Act has to be made at the time and in the manner indicated, in view of the purpose of its acquisition.

(7) The meaning of the word "vest" in Section 3 and Section 6 of the Act has to be so understood in the different contexts.

(8) Section 8 of the Act is meant for payment of compensation to owners of the property vesting absolutely in the Central Government, the title to which is not in dispute being in excess of the disputed area which alone is the subject mater of the revived suits. It does not apply to the disputed area, title to which has to be adjudicated in the suits and in respect of which the Central Government is merely the statutory receiver as indicated, with the duty to restore it to the owner in terms of the adjudication made in the suits.

(9) The challenge to acquisition of any part of the adjacent area on the ground that it is unnecessary for achieving the professed objective of settling the long-standing dispute cannot be examined at this stage. However, the area found to be superfluous on the exact area needed for the purpose being determined on adjudication of the dispute, must be restored to the undisputed owners.

(10) Rejection of the challenge by the undisputed owners to acquisition of some religious properties in the vicinity of the disputed area, at this stage is with the liberty granted to them to renew their challenge, if necessary at a later appropriate stage, in case of continued retention by Central Government of their property in excess of the exact area determined to be needed on adjudication of the dispute.

(11) Consequently, the Special Reference No.1 of 1993

made by the President of India under Article 143(1) of the Constitution of India is superfluous and unnecessary and does not require to be answered. For this reason, we very respectfully decline to answer it and return the same.

(12) The questions relating to the constitutional validity of the said Act and maintainability of the Special Reference are decided in these terms.

101. These matters are disposed of, accordingly, in the manner stated above.

(M. N. VENKATACHALIAH) CJI.

(J. S. VERMA) J.

(G. N. RAY) J.

New Delhi
October 24, 1994.

Minority Judgement*

BHARUCHA, J.

102. We have had the benefit of reading the erudite judgment of our learned brother, Verma, J. We are unable to take the view expressed by him and must respectfully dissent.

103. It is convenient to deal with the validity of The Acquisition of Certain Area At Ayodhya Act, 1993, and the maintainability of the Presidential Reference dated 7th January, 1993 under Article 143(1) of the Constitution of India in a common opinion.

104. The historical background, as now set out, is drawn from the *White Paper* on Ayodhya issued by the Government of India in February, 1993. This was the basis upon which the Bill to bring the said Act upon the statute book was prepared and the Reference was made.

105. "Ayodhya... has long been a place of holy pilgrimage because of its mention in the epic Ramayana as the place of birth of Shri Ram. The structure commonly known as Ram Janma Bhoomi-Babri Masjid was erected as a mosque by Mir Baqi in Ayodhya in 1528 AD. It is claimed by some sections that it was built at the site believed to the birth-spot of Shri Ram where a temple had stood earlier". (Para 1.1 of the *White Paper.*) The disputed structure was used by the Muslims for offering prayers until the night of 22nd/23rd December, 1949, "when Hindu idols were placed under the central dome of the main portion of the disputed structure. Worship of these idols was started on a big scale from the next morning. As this was likely to disturb the public peace the civil administration attached the premises under the provisions of Section 145 of the Criminal Procedure Code. This was the starting point of a whole chain of events which ultimately led to the demolition of the structure." (Paras 2.13 and 2.15). In 1950 two suits were filed by Hindu gentlemen; in one of these suits, in January 1950, the Civil Judge concerned passed interim orders whereby the idols remained in place and puja continued. The interim order was confirmed by the High Court in April 1955. On 1st February, 1986, the District Judge concerned ordered the opening of the locks upon the disputed structure and permitted puja by devotees. In 1959 a suit was filed claiming title to the disputed structure by the Nirmohi Akhara. In 1961 another suit was filed claiming title to the disputed structure by the Sunni Central Wakf Board. In 1989 Devki Nandan Agarwal as the next friend of the deity, that is to say, the said idols, filed a title suit in respect of the disputed structure. In 1989 the suits aforementioned were transferred to the Allahabad High Court and were ordered to be heard together. On 14th August, 1989, the High Court ordered the maintenance of status quo in respect of the disputed structure. (Appendix I to the *White Paper*.) "The controversy entered a new phase with the placing of idols in the disputed structure in December 1949. The premises were attached under Section 145 of the Code of Criminal Procedure. Civil suits were filed shortly thereafter. The interim order in these civil suits restrained the parties from removing the idols or interfering with their worship. In effect, therefore, from December 1949 till December 1992 the structure had not been used as a mosque." (Para 1.2) On 6th December, 1992, the disputed structure was demolished. "The demolition... was a most reprehensible act. The perpetrators of this deed struck not only against a place of worship but also at the principles of secularism, democracy and the rule of law..." (Para 1.35.) At 6.45 p.m. on that day the idols were replaced where the disputed structure had stood and by 7.30 p.m. work had started on the construction of a temporary structure for them. (Para 1.20) At about 9.10 p.m. the President of India issued a proclamation under the provisions of Article 356 assuming to himself all the functions of the Government of Uttar Pradesh and dissolving its Vidhan Sabha. (Para 1.21.)

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* For A.M. Ahmadi, J., and himself

106. A structure called the Ram Chabutra stood on the disputed site, within the courtyard of the disputed structure. This structure was also demolished on 6th December, 1992 (Appendix V of the *White Paper)*. As a result, worship by the Hindus thereat, which, it appears, had been going on for a considerable period of time without objection by the Muslims, came to an end.

107. After the imposition of President's rule, the Central Government took, inter alia, the following decisions: "the Government will see to it that the demolished structure is re-built, and appropriate steps will be taken regarding new Ram temple." (Para 1.22)

108. On 27th December, 1992, the aforesaid decisions taken on 7th December, 1992, "to re-build the demolished structure and to take appropriate steps regarding new Ram temple" were "elaborated ... as follows:

> The Government has decided to acquire all areas in dispute in the suits pending in the Allahabad High Court. It has also been decided to acquire suitable adjacent area. The acquired area excluding the area on which the disputed structure stood would be made available to two trusts which would be set up for construction of a Ram Temple and Mosque respectively and for planned development of the area.

109. "The Government of India has also decided to request the President to seek the opinion of the Supreme Court on the question whether there was a Hindu temple existing on the site where the disputed structure stood. The Government has also decided to abide by the opinion of the Supreme Court and to take appropriate steps to enforce the Court's opinion. Notwithstanding the acquisition of the disputed area, the Government would ensure that the position existing prior to the promulgation of the Ordinance is maintained until such time as the Supreme Court gives its opinion in the matter. Thereafter the rights of the parties shall be determined in the light of the Court's opinion." (Para 8.11)

110. An Ordinance, which was replaced by the said Act, was issued on 7th January, 1993. The Reference under Article 143 was made on the same day. We shall refer to the provisions of the Act later. For the present, it is necessary to set out the Reference in full:

> "WHEREAS a dispute has arisen whether a Hindu temple or any Hindu religious structure existed prior to the construction of the structure (including the premises of the inner and outer courtyards of such structure), commonly known as the Ram Janma Bhumi-Babri Masjid, in the area in which the structure stood in village Kot Ramachandra in Ayodhya, in Pargana Haveli Avadh, in Tehsil Faizabad Sadar, in the district of Faizabad of the State of Uttar Pradesh.
>
> 2. AND WHEREAS the said area is located in Revenue Plot Nos. 159 and 160 in the said village Kot Ramachandra;
>
> 3. AND WHEREAS the said dispute has affected the maintenance of public order and harmony between different communities in the country;
>
> 4. AND WHEREAS the aforesaid area vests in the Central Government by virtue of the Acquisition of Certain Area at Ayodhya Ordinance, 1993;
>
> 5. AND WHEREAS notwithstanding the vesting of the aforesaid area in the Central Government under the said Ordinance the Central Government proposes to settle the said dispute after obtaining the opinion of the Supreme Court of India and in terms of the said opinion;
>
> 6. AND WHEREAS in view of what has been hereinbefore stated it appears to me that the question hereinafter set out has arisen and is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court of India thereon;
>
> 7. NOW, THEREFORE, in exercise of the powers conferred upon me by clause (1) of article 143 of the Constitution of India, I, Shanker Dayal Sharma, President of India, hereby refer the following question to the Supreme Court of India for consideration and opinion thereon, namely,
>
> > Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi-Babri Masjid (including the premises of the inner and outer courtyards of such structure) in the area on which the structure stood?"

111. It will be seen that the fifth recital of the Reference states that "the Central Government proposes to settle the said dispute after obtaining the opinion of the Supreme Court of India and in terms of the said opinion". The learned Solicitor General, appearing for the Central Government, submitted that this meant that the Central Government "was committed to bring about a settlement in the light of the Supreme Court opinion and consistent therewith. However, at this stage it cannot be predicated as to the precise manner in which progress towards a solution could be made". If, he submitted orally, no amicable solution was reached, the Central Government would take steps to enforce the Supreme Court's opinion. To avoid ambiguity, the learned Solicitor General was asked to take instructions and put in writing the Central Government's position in this behalf; if the answer to the question posed by the Reference was that no Hindu temple or religious structure has stood on the disputed site prior to the construction of the disputed structure, would the disputed structure be re-built? On 14th September, 1994, the learned Solicitor General made the following statement in response:

> "Government stands by the policy of secularism and of even-handed treatment of all religious communities. The Acquisition of Certain Area at Ayodhya Act, 1993, as well as the Presidential Reference, have the objective of maintaining public order and promoting communal harmony and the spirit of common brotherhood amongst the people of India.
>
> Government is committed to the construction of a Ram temple and a mosque, but their actual location will be determined only after the Supreme Court renders its opinion in the Presidential Reference.
>
> Government will treat the finding of the Supreme Court on the question of fact referred under Article 143 of the Constitution as a verdict which is final and binding.
>
> In the light of the Supreme Court's opinion and consistent with it, Government will make efforts to resolve the controversy by a process of negotiations. Government is confident that the opinion of the Supreme Court will have a salutary effect on the attitudes of the communities and they will no longer take conflicting positions on the factual issue settled by the Supreme Court.
>
> If efforts at a negotiated settlement as aforesaid do not succeed, Government is committed to enforce a solution in the light of the Supreme Court's opinion and consistent with it, Government's action in this regard will be even-handed in respect of both the communities. If the question referred is answered in the affirmative, namely, that a Hindu temple/structure did exist prior to the construction of the demolished structure, Government action will be in support of the wishes of the Hindu community. If, on the other hand, the question is answered in the negative, namely, that no such Hindu temple/structure existed at the relevant time, then Government action will be in support of the wishes of the Muslim community.

112. The learned Solicitor General was asked to clarify whether the Central Government proposed to act in support of either community's wishes as presently known or as ascertained after the answer to the Reference was given and negotiations had failed. The learned Solicitor General was unable to get instructions in this behalf from the Central Government. It is fair to say that he had not much time to do so as the arguments were closed on the day after the clarification was sought.

113. It is relevant now to refer to the content of the dispute. "At the centre of the dispute is the demand voiced by the Vishwa Hindu Parishad (VHP) and its allied organisations for the restoration of a site said to be the birth place of Shri Ram in Ayodhya. Till 6th December, 1992, this site was occupied by the structure erected in 1528 by Mir Baqi who claimed to have built it on orders of the first Mughal Emperor Babar" . "The VHP and its allied organisations based their demand on the assertion that this site is the birth place of Shri Ram and a Hindu temple commemorating this site stood here till it was destroyed on Babar's command and a masjid was erected in its place." "During the negotiations aimed at finding an amicable solution to the dispute one issue which came to the fore was whether a Hindu temple had existed on the site occupied by the disputed structure and whether it was demolished on Babar's order for the construction of the masjid. ... It was stated by certain Muslim leaders that if these assertions were proved, the Muslims would voluntarily hand over the disputed shrine to the Hindus". [Paras 2.1, 2.2 and 2.3 of the *White Paper*.]

114. The Statement of Objects and Reasons for the Act states:

> "It was considered necessary to acquire the site of the disputed structure and suitable adjacent land for setting up a complex which could be developed in a planned manner wherein a Ram temple, a mosque, amenities for pilgrims, a library, museum and other suitable facilities can be set up."

115. The Act has been placed on the statute book to provide for the acquisition of "certain area at Ayodhya and for matters connected therewith or incidental thereto". The Act recites that there had "been a long-standing dispute" relating to the structure afore-mentioned which had affected the maintenance of public order and harmony between different communities in the country. It was "necessary to maintain public order and promote communal harmony and the spirit of common brotherhood among the people of India". It was necessary to acquire certain areas in Ayodhya "with a view to achieve the aforesaid objectives".

116. The Act, by reason of Section 1(2), is deemed to have come into force on 7th January, 1993 (which is the date on which the Ordinance was passed). Section 2(a) defines "area" to mean the area specified in the Schedule to the Act, including the buildings, structures or other properties comprised therein. Section 2(b) defines "authorised person" to mean "a person or body of persons or trustees of any trust authorised by the Central Government under Section 7".

117. By reason of Section 3, on and from the commencement of the Act, the right, title and interest in relation to the area stands transferred to and vests in the Central Government.

118. Section 4(1) states that the "area shall be deemed to include all assets, rights, leaseholds, powers, authority and privileges and all property, movable and immovable, ... and all other rights and interests in or arising out of such properties as were immediately before the commencement of this Act in the ownership or control of any person or the State Government ... and all registers, maps, plans, drawings and other documents of whatever nature relating thereto". By reason of Section 4(2) all the properties which have vested in the Central Government under Section 3 shall, by the force of such vesting, stand freed and discharged from any trust, obligation, mortgage, charge, lien and all other encumbrances affecting them and any attachment, injunction, decree or order of any court or tribunal or other authority restricting the use of such properties in any manner or appointing any receiver in respect of the whole or any part of such properties shall cease to have any effect. Section 4(3) states that any suit, appeal or other proceedings in respect of the right, title and interest relating to any property which is vested in the Central Government under Section 3 which was pending before any court, tribunal or other authority on the date of the commencement of the Act "shall abate".

119. Section 5 empowers the Central Government to take all steps necessary to secure the possession of the area that vests in it.

120. Section 6 reads thus:

> "(1) Notwithstanding anything contained in section 3, 4, 5 and 7 the Central Government may, if it is satisfied that any authority or other body, or trustees of any trust, set up on or after the commencement of this Act is or are willing to comply with such terms and conditions as that Government may think fit to impose, direct by notification in the Official Gazette, that the right, title and interest or any of them in relation to the area or any part thereof, instead of continuing to vest in the Central Government, vest in that authority or body of trustees of that trust either on the date of the notification or on such later date as may be specified in the notification.
>
> (2) When any right, title and interest in relation to the area or part thereof vest in the authority or body or trustees referred to in sub-section (1), such rights of the Central Government in relation to such area or part thereof, shall, on and from the date of such vesting, be deemed to have become the rights of that authority or body or trustees of that trust.
>
> (3) The provisions of section 4, 5, 7 and 11 shall, so far as may be, apply in relation to the Central Government and for this purpose references therein to the Central Government shall be construed as references to such authority or body or trustees."

121. Section 7 is the only section under the Chapter entitled "Management And Administration of Property", and it reads thus:

> "(1) Notwithstanding anything contained in any contract or instrument or order of any court, tribunal or other authority to the contrary, on and from the commencement of this Act, the property vested in the Central Government under section 3 shall be managed by the Central Government or by a person or body of persons or trustees of any trust authorised by that Government in this behalf.
>
> (2) In managing the property vested in the Central Government under section 3, the Central Government or the authorised person shall ensure that the position existing before the commencement of this Act in the area on which the structure (including the premises of the inner and outer courtyards of such structure), commonly known as the Ram Janma Bhumi-Babri Masjid, stood in village Kot Ramachandra in Ayodhya, in Pargana Haveli Avadh, in tehsil Faizabad Sadar, in the district of Faizabad of the State of Uttar Pradesh is maintained."

122. By reason of Section 8 the owner of any land, building, structure or other property comprised in the "area" shall be given by the Central Government in cash equivalent to the market value of the land, building, structure or other property that has been transferred to and vests in the Central Government under Section 3. For the purpose of deciding the claim of the owner, the Central Government is to appoint a Claims Commissioner. Claims are required to be made within a period of 90 days from the date of the commencement of the Act.

123. Section 9 makes it clear that the provisions of the Act would have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any law other than the Act or any decree or order of any court, tribunal or other authority. Section 10 provides for penalties for non-compliance with the provisions of the Act. Section 11 provides for protection for action taken in good faith under the Act. Section 12 empowers the Central Government to make rules to carry out the provisions of the Act. By reason of Section 13 the Ordinance is repealed.

124. The Act may now be analysed.

125. "Area" under Section 2(a) of the Act is that specified in the Schedule. Again, "area" under Section 3 is that specified in the Schedule. "Area", by reason of Section 4(1), includes assets and all property, movable and immovable, and all other rights and interests in or arising out of such property. "Area", in other words, includes the whole bundle of movable and immovable property in the area specified in the Schedule and all other rights and interests therein or arising thereout. The whole bundle of property and rights vests, by reason of Section 4(2), in the Central Government freed and discharged form all encumbrances.

126. Section 7(1) speaks of property vested in the Central Government under Section 3. It, therefore, speaks of the whole bundle of property and rights. These are to be managed by the Central Government or any person or body of persons or trustees of any trust so authorised. In managing the whole bundle of property and rights "the Central Government or the authorised person shall ensure that the position existing before the commencement of this

Act in the area on which the structure (including the premises of the inner and outer court-yards) ... stood ... is maintained". This provision in Section 7(2) relates only to that part of the area upon which the disputed structure stood (the disputed site).

127. Now, as to the "authorised person". Section 7(1) says that the whole bundle of property and rights shall be managed by the Central Government or by a person or body of persons or trustees of any trust authorised by the Central Government. This, as Section 7(2) shows, is the "authorised person" under Section 2(b). He or it may not be the authority or other body or trustees referred to in Section 6(1). In other words, the power to manage the whole bundle of property and rights may be conferred upon any person or body of persons or trustees of any trust even though he or they are not required to comply with the terms and conditions that the Central Government may deem fit to impose under Section 6(1).

128. "In managing the property vested in the Central Government under Section 3" (which, read with Section 4(1), means the whole bundle of property and rights) "the Central Government or the authorised person shall ensure that the position existing before the commencement of this Act in the area on which the structure (including the premises of the inner and outer courtyards of such structure) ... stood ... is maintained". This provision in Section 7(2) speaks of "the position existing before the commencement of this Act", i.e., existing before midnight on the night of 6th/7th January, 1993. This provision, therefore, requires the Central Government or the authorised person to ensure, in managing the whole bundle of property and rights, that the position existing on the disputed site before midnight on the night of 6th/7th January, 1993, is maintained.

129. The obligation is cast in regard to the "management" of the whole bundle of property and rights. This implies that the Central Government or the authorised person is required to continue with the puja that was being performed on the disputed site before 7th January, 1993. This is provided for even though by behalf cease to have effect.

130. There is no provision in the Act which indicates in clear terms what use the whole bundle of property and rights, including the disputed site, will be put to by the Central Government. An indication in this behalf is provided by Section 6. Section 6 is an enabling provision. By reason of Section 6(1), notwithstanding the vesting in the Central Government of the whole bundle of property and rights, "the Central Government may, if it is satisfied that any authority or other body or trustees of any trust set up on or after the commencement of this Act is or are willing to comply with such terms and conditions as that Government might think fit to impose direct … that the right, title and interest or any of them" in relation to the whole bundle of property or rights or any part thereof, instead of continuing to vest in the Central Government, shall vest in that authority or body or trustees of that trust. Thereupon, by reason of Section 6(2) shall, on and from the date of such vesting, be deemed to have become the rights of that authority or body or trustees of that trust. In other words, when the vesting takes place in respect of the whole bundle of property and rights or of any part thereof, all the rights of the Central Government in the whole bundle of property and rights or such part thereof as has been vested, shall be deemed to be transferred to the authority or body or trust in which it is vested.

131. The provisions of Section 6 apply to the whole bundle of property and rights; that is to say, they apply also to the disputed site. The disputed site may also be vested in an authority or body or trust that is willing to comply with the terms and conditions that the Central Government might think fit to impose. Those terms and conditions are not specified in the Act, nor is there any indication in that behalf available. The only restriction imposed upon such authority or body or trust, apart from the terms and conditions that the Central Government may think fit to impose, are those provided in Section 7. This is set out in Section 6(3). The provisions of Section 4, 5, and 11 which are also mentioned in Section 6(3) are provisions that empower and protect the authority or body or trust.

132. Section 7 relates to the management and administration of the whole bundle of property and rights. Section 7(1) states that it shall be managed by the Central Government or by a body of persons or trustees of any trust authorised by the Government in this behalf; in other words, the authorised person. Section 7(2) obliges the Central Government or the authorised person, in managing the whole bundle of property and rights, to ensure that "the position existing" before the commencement of the Act in the area on which the disputed structure stood "in maintained". The Central Government or the authorised person is, therefore, obliged to maintain the "position" in respect of the disputed site as it was before midnight on the night of 6th/7th January, 1993, and it is required to do so in "managing" the whole bundle of property and rights. This implies not only that the debris of the demolished structure must be maintained as it stands but also that the idols which had been placed on the disputed site after the demolition had taken place must be retained where they are and the puja carried on before them must be continued.

133. Since the Act does not spell out the use to which the whole bundle of property and rights in intended to be put and since the provisions of Section 7 are applicable even to the authority or body or trust in which the Central Government may vest the whole bundle of property and rights or any part thereof under the provisions of Section 6, it is possible to read the provisions of Section 7 as being of a permanent nature. The Act read by itself, therefore, suggests that the idols shall remain on the disputed site for an indefinite period of time and puja shall continue to be performed before them.

134. Section 8 gives to the owner of any land, building, structure of other property which is acquired compensation equivalent to the market value thereof. Claims in that behalf are to be entertained by a Claims Commissioner to be appointed by the Central Government. For the purpose of establishing his claim, the owner would have to establish his title to the property that has been acquired. The suits in the Allahabad High Court which abate by reason of Section 4(3) relate to the title of the disputed site. In other words, the forum for the adjudication of the title to the disputed site is shifted from the courts to the Claims Commissioner.

135. The above is an analysis of the Act by itself. It is necessary to read it also in the context of its Statement of Objects and

Reasons and the Reference.

136. The Statement of Objects and Reasons state that the acquisition of the whole bundle of property and rights is necessary for setting up a planned complex housing "a Ram Temple, a mosque, amenities for pilgrims, a library, museum and other suitable facilities." The authority or other body or trustees of any trust willing to comply with such terms and conditions as the Central Government may think fit to impose would, under the provisions of Section 6, be vested with a part of the whole bundle of property and rights to construct and maintain a Ram temple and concommitant amenities. Another authority or body or trust so willing would be vested with another part of the whole bundle of property and rights to construct and maintain a mosque and concommitant facilities. So read, the provisions relating to the management and administration of the whole bundle of property and rights contained in Section 7 are interim provisions, to operate until vesting under Section 6 has taken place.

137. Having regard to the provisions of Section 6, the Statement of Objects and Reasons and the Reference, the acquisition of the disputed site and surrounding land is to hold the same pending the resolution of the dispute regarding the disputed site. The resolution of the dispute is to take place in the manner stated in the Reference. Upon such resolution the disputed site would be handed over for the construction of mosque or a Ram temple, as the case may be, and the surrounding area would house a place of worship of the other religion and ancillary facilities for the places of worship of both the Muslim and the Hindu communities. The validity of the provisions of Section 3, by reason of which the whole bundle of property and rights stands transferred to and vests in the Central Government, and, therefore, of the Act itself, depends upon the validity of the provisions that follow it, particularly, Section 4.

138. Section 4(1) states that the "area shall be deemed to include all assets, rights, leaseholds, powers, authority and privileges and all property, movable and immovable ... and all other rights and interests in or arising out of such properties as were immediately before the commencement of this Act in the ownership or control of any person or the State Government ... and all registers, maps, plans, drawings and other documents of whatever nature relating thereto". By reason of Section 4(2) all the properties which have vested in the Central Government under Section 3 shall, by the force of such vesting, stand freed and discharged form any trust, obligation, mortgage, charge, lien and all other encumbrances affecting them and any attachment, injunction, decree or order of any court or tribunal or other authority restricting the use of such properties in any manner or appointing any receiver in respect of the whole or any part of such properties shall cease to have any effect. Section 4(3) states that any suit, appeal or other proceedings in respect of the right, title and interest relating to any property which is vested in the Central Government under Section 3 which was pending before any court, tribunal or other authority on the date of the commencement of the Act "shall abate". By reason of Section 8 the owner of any land, building, structure or other property comprised in the "area" shall be given by the Central Government in cash an amount equivalent to the market value of the land, building, structure or other property that has been transferred to and vests in the Central Government under Section 3. Such claims are to be decided by a Claims Commissioner, who is entitled to regulate his own procedure.

139. As the *White Paper* shows, the demolished structure was built as a mosque in 1528. It was used as a mosque form 1528 until the night of 22nd/23rd December, 1949, when the idols were placed therein. The idols continue in the disputed structure by reason of the orders of the courts. Under the orders of the court passed in 1986 public worship of the idols was permitted. This state of affairs continued until 6th December, 1992, when the disputed structure was demolished.

140. The effect of Section 4 of the Act is that the Sunni Wakf Board, which administered the mosque that was housed in the disputed structure, and the Muslim community lose their right to plead adverse possession of the disputed site from 1528 until 1949, if not up-to-date considering that the idols remained in the disputed structure only under the orders of the courts. Instead of judicial determination of the title to the disputed site on the basis of the law, the disputed site, along with surrounding land has been acquired and a complex with a mosque and a temple thereon is planned. What is to happen to the disputed site is to depend upon the answer to the question posed in the Reference and negotiations based thereon. The question posed in the Reference is; whether a Hindu temple or any other Hindu religious structure existed prior to the construction of the disputed site. The learned Solicitor General fairly stated that the court should read the question as asking whether any Hindu temple or other Hindu religious structure stood on the disputed site immediately before the disputed structure was built thereon. The dispute it will be remembered, was that a Ram temple had stood on the disputed site and it was demolished to make place for the disputed structure; the question posed, however is: was there "a Hindu temple or any Hindu religious structure" on the disputed site. Secondly the salient fact as to whether the temple if any was demolished to make place for the disputed structure is not to be gone into. The disputes as to title to the disputed site survive for consideration for the purpose of award of compensation. For this purpose title shall have to be established not before a court of law but before a Claims Commissioner to be appointed by the Central Government, who is entitled to devise his own procedure. No right of appeal or reference to a civil court is provided for with the result that the decision of the Claims Commissions would be final except for a remedy under Article 226/227 of the Constitution. For the reasons aforesaid the provisions of section 4 and 8 of the Act must be held to be arbitrary and unreasonable.

141. More importantly the provisions of Section 4 of the Act, inasmuch as they deprive the Sunni Wakf Board and the Muslim community of the right to plead and establish adverse possession as aforesaid and restrict the redress of their grievance in respect of the disputed site to the answer to the limited question posed by the Reference and to negotiations subsequent thereto, and the provisions of Section 3 of the Act, which vest the whole bundle of property and rights in the Central Government to achieve this purpose, offend the principle of secularism which is a part of the basic structure of the Constitution, being slanted in favour of one religious community as against another.

142. That secularism is a part of the basic features of the Constitution was held in *Kesavananda Bharati* v. *State of Kerala,* 1973 (4) SCC 225. It was unanimously reaffirmed by the nine Judge bench of this Court in *S.R. Bommai* v. *Union of India,* 1994 (3) SCC 1. Sawant, J analysed the Preamble of the Constitution and various articles therein and held that these provisions, by implication, prohibited the establishment of a theocratic state and the State was enjoined to accord equal treatment to all religions. K. Ramaswamy, J. quoted the words written by Gandhiji that are as apposite now as at the time when he wrote them: "The Allah of Muslim is the same as the God of Christians and Ishwara of Hindus." B.P. Jeevan Reddy, J. said:

> "While the citizens of this country are free to profess, practice and propagate such religion faith or belief as they choose, so far as the State is concerned, i.e., from the point of view of the State the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally. How is this equal treatment possible, if the State were to prefer or promote a particular religion, race or caste, which necessarily means a less favourable treatment of all other religions races and castes. How are the constitutional promises of social justice, liberty of belief, faith or worship and equality of status and of opportunity to be attained unless the State eschews the religion, faith or belief of a person from its consideration altogether while dealing with him, his rights, his duties and his entitlements? Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality. This may be a concept evolved by Western liberal thought or it may be, as some say, an abiding faith with the Indian people at all points of time. That is not material. What is material is that it is a constitutional goal and a basic feature of the Constitutional as affirmed in *Kesavananda Bharati* v. *State of Kerala,* 1973 (4) SCC 225 and *Indira N. Gandhi* v. *Raj Narain,* 1975 (Supp.) SCC 1; 1976 (2) SCR 347. Any step inconsistent with this constitutional policy is in plain words unconstitutional."

The State has no religion. The State is bound to honour and to hold the scales even between all religions. It may not advance the cause of one religion to the detriment of another.

143. The core provisions of the Act are Section 3, 4 and 8. The other provisions of the Act are only ancillary and incidental to Sections 3, 4, and 8. Since the core provisions of Sections 3, 4, and 8 are unconstitutional, the Act itself cannot stand.

144. The provisions of Section 7 are referred to in support of the finding that the Act is skewed to favour one religion against another.

145. The provisions of Section 7(1) empower the Central Government to entrust the management of the acquired area to "any person or body of person or trustees of any trust". Section 7(2) states that "in managing the property vested in the Central Government under Section 3 the Central Government or the authorised person ... shall ensure that the position existing before the commencement of this Act in the area on which" the disputed structure "stood ... is maintained". It is relevant to note that "the position" is required to be maintained in the course of "managing the property". Before "the commencement of this Act" the disputed structure had been demolished, the idols had been placed on the disputed site and puja thereof had begun. Section 7(2), therefore, require that the puja must continue so long such management continues. For how long such management is to continue and on the happening of what event it will come to end is not indicated. Section 7(2), thus, perpetuates the performance of puja on the disputed site. No account is taken of the fact that the structure thereon had been destroyed in "a most reprehensible act. The perpetrators of this deed struck not only against a place of worship but at the principles of secularism democracy and the rule of law..." (*White Paper*, para 1.35.) No account is taken of the fact that there is a dispute in respect of the site on which puja is to be performed; that, as stated in the *White Paper*, until the night of 22nd/23rd December, 1949 when the idols were placed in the disputed structure, the disputed structure was being used as a mosque; and that the Muslim community has a claim to offer namaaz thereon.

146. References was made in the course of the proceedings to the provisions of The Places of Worship Special Provisions Act, 1991. It is a statute to prohibit the conversion of any place of worship and to provide for the maintenance of the religious character of any places of worship as it existed on 15th August, 1947. It enjoins that no person shall convert any place of worship of any religious denomination or any section thereof into a place of worship of a different section of the same religious denomination or of a different religious denomination or any section thereof. It declares that the religious character of a place of worship existing on 15th August, 1947 shall continue to be the same as it existed on that date. It is specified that nothing contained in the statute shall apply to the place of worship which was the disputed structure at Ayodhya and to any suit, appeal or other proceedings relating to it. Based upon The Places of Worship Act, it was submitted that what had happened at Ayodhya on 6th December, 1992, could never happen again. The submission overlooks the fact that the Indian Penal Code contains provisions in respect of offences relating to religion. Section 295 thereof states that whoever destroys, damages of defiles any places of worship or any object held sacred by any class of persons with the object of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion shall be punished. Section 295 provides for punishment of a person who with the deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representation or otherwise insults or attempts to insult the religion or religious beliefs of that class. Those who razed the disputed structure to the ground on 6th December, 1992, were not deterred by these provisions. Others similarly minded are as little likely to be deterred by the provisions of The Places of Worship Act.

147. The Preamble to the Constitution of India proclaims that India is a secular democratic republic. Article 15 in Part III of the Constitution, which provides for fundamental rights, debars the State from discriminating against any citizens on the ground of religion. Secularism is given pride of place in the Constitution. The object is to preserve and protect all religions, to place all religious communities on a par. When, therefore, adherents of the religion of the majority of Indian citizens make a claim upon and assail the place of worship of another religion and by dint of numbers create conditions that are conducive to public disorder, it is the constitutional obligation of the State to protect that place of worship and to preserve public order using for the purpose such means and forces of law and order as are required. It is impermissible under the provisions of the Constitution for the State to acquire that place of worship to preserve public order. To condone the acquisition of a place of worship in such circumstances is to efface the principle of secularism from the Constitution.

148. We must add a caveat. If the title to the place of worship is in dispute in a court of law and public order is jeopardised, two courses are open to the Central Government. It may apply to the concerned court to be appointed Receiver of the places of worship, to hold it secure pending the final adjudication of its title, or it may enact legislation that makes it Statutory Receiver of the place of worship pending the adjudication of its title by the concerned court. In either event, the Central Government would bind itself to hand over the place of worship to the party in whose favour its title is found.

149. The learned Solicitor General submitted:

> When conflicting claims are made and deep sentiments are involved, a solution may hurt one or other of the sentiments, but on that account it cannot be characterised as partial or lacking in neutrality.
>
> When amity and harmony between communities are threatened, it is one of the secular duties of the State to help the parties towards a solution which the Government feels will be accepted over the course of time if not immediately and which will have the effect of abating and blunting the violence of the strife and conflict. The Act and the Reference make an attempt in the direction of restoring amity and harmony between the communities. Their objective is secular.

We cannot for the reasons stated above agree.

150. A brief reference to Article 25 (1) may now be made. It reads:

> "25. Freedom of conscience and free profession, practice and propagation of religion — (1) Subject to Public order, morality and health and to the

> other provisions of this Part all person are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion."

Article 25(1) protects the rights of individuals. (See *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 S.C.R. 1005 at 1021.)* Exercise of the right of the individual to profess, practice and propagate religion is subject to public order. Secularism is absolute; the State may not treat religions differently on the ground that public order requires it.

151. The principle of secularism illumines the provisions of Articles 15 and 16. Article 15 obliges the State not to discriminate against any citizen on the ground of religion. The obligation is not subject to any restriction. Article 16(1) declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Article 16(2) puts the requirements negatively: no citizen shall on the ground of religion be ineligible for or be discriminated against in respect of any employment or office under the State. Again, the obligation in this behalf is not subject to any restriction. The "hands-off" approach required of the State in matters of religion is illustrated also by Article 27, by reason whereof no person can be compelled to pay any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion. Article 29(2) may also be noted for its absolute terms: no citizens can be denied admission into any educational institution maintained by the State or receiving aid out of State funds on the grounds of religion.

152. This brings us to the Reference. The Act having been struck down, the suits as to the title of the disputed site in the Allahabad High Court revive and the purpose for which the Reference was made may be said to have become redundant. On the other hand, it my be said that the revival of the suits does not debar the Central Government from negotiating to bring an amicable solution to the dispute at Ayodhya and such negotiations depend upon the answer given to the question posed by the

Reference. We shall, therefore deal with the Reference and proceed upon the basis that it is maintainable under the provisions of Article 143.

153. In Special Reference No. 1 of 1964, 1965 (1) S.C.R. 413, this Court held:

> "It is quite true that under Art. 143(1) even if questions are referred to this court for its advisory opinion this Court is not bound to given such advisory opinion in every case. Art. 143(1) provides that after the questions formulated by the President are received by this Court, it may after such hearing as it thinks fit, report to the President its opinion thereon. The use of the word "may" in contrast with the use of the word "shall" in the provision prescribed by Art. 143(2) clearly brings out the fact that in a given case this Court may respectfully refuse to express its advisory opinion if it is satisfied that it should not express its opinion having regard to the nature of the question forwarded to it and having regard to the other relevant facts and circumstances."

In Re the Special Courts Bill, 1978, 1979 (2) SCR 476, this Court said:

> "Article 143(1) is couched in broad terms which provide that any question of law or fact may be referred by the President for the consideration of the Supreme Court if it appears to him that such a question has arisen or is likely to arise and if the question is of such a nature and of such public importance that it is expedient to obtain the opinion of the Court upon it. Though question of fact have not been referred to the Court in any of the six reference made under Article 143(1) that Article empowers the President to make a reference even on questions of fact provided the other conditions of the article are satisfied. It is not necessary that the question on which the opinion of the Supreme Court is sought must have arisen actually. It is competent to the President to make a reference under article 143(1) at an anterior stage, namely, at the stage when the President is satisfied that the question has arisen or is likely to arise and whether it is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, is a matter essentially for the President to decide. The plain duty and function of the Supreme Court under article 143(1) of the Constitutions is to consider the question on which the President has made the reference and report to the President its opinion, provided of course the question is capable of being pronounced upon and falls within the power of the court to decide. If, by reason of the manner in which the question is framed or for any other appropriate reason the Court considers it not proper or possible to answer the question it would be entitled to return the reference by pointing out the impediments in answering it. The right of this Court to decline to answer a reference

> does not flow merely out of the different phraseology used in clauses (1) and (2) of article 143, in the sense that clause (1) provides that the Court "may" report to the President its opinion on the question referred to it, while clause (2) provides that the Court "shall" report to the President its opinion on the question. Even in matters arising under clause (2) though that question does not arise in this reference, the court may be justified in returning the reference unanswered if it finds for a valid reason that the question is incapable of being answered. With these preliminary observation we will consider the contentions set forth above."

This Court is, therefore, entitled to decline to answer a question posed to it under Article 143 if it considers that it is not proper or possible to do so, but it must indicate its reason.

154. In our view, the Reference must not be answered, for the following reasons.

155. The Act and the Reference, as stated hereinabove favour one religious community and disfavour another; the purpose of the Reference is, therefore, opposed to secularism and is unconstitutional. Besides, the Reference does not serve a constitutional purpose.

156. Secondly, the fifth recital to the Reference states that "*the Central Government proposes to settle the said dispute* after obtaining the opinion of the Supreme Court of India and *in terms of the said opinion.*" (Emphasis supplied) It is clear that the Central Government does not propose to settle the dispute in terms of the Court's opinion. It proposes to use the Courts opinion as a springboard for negotiations. Resolution of the dispute as a result of such negotiations cannot be said to be a resolution of the dispute "in terms of the said opinion". Asked to obtain instructions and tell the court that the mosque would be rebuilt if the question posed by the Reference was answered in the negative, the learned Solicitor General made the statement quoted above. It leaves us in no doubt that even in the circumstances that this court opines that no Hindu temple or Hindu religious structure existed on the disputed site before the disputed structure was built thereon, there is no certainty that the mosque will be rebuilt.

157. Thirdly, there is the aspect of evidence in relation to the question referred. It is not our suggestion that a court of law is not competent to decide such a question. It can be done if expert evidence of archaeologists and historians is led, and is tested in cross examination. The principal protagonists of the two stands are not appearing in the Reference; they will neither lead evidence nor cross examine. The learned Solicitor General stated that the Central Government would lead no evidence, but it would place before the court the material that it had collected from the two sides during the course of earlier negotiations. The Court being ill equipped to examine and evaluate such material, it would have to appoint experts in the field to do so, and their evaluation would go unchallenged. Apart from the inherent inadvisability of rendering a judicial opinion on such evaluation, the opinion would be liable to the criticism of one or both sides that it was rendered without hearing them or their evidence. This would ordinarily be of no significance for they had chosen to stay away, but this opinion is intended to create a public climate for negotiations and the criticism would find the public ear, to say nothing of the fact that it would impair this court's credibility.

158. Ayodhya is a storm that will pass. The dignity and honour of the Supreme Court cannot be compromised because of it.

159. No observation that we have made is a reflection on the referring authority. We have the highest respect for the office of the President of India and for its present incumbent; his secular credentials are well known.

160. Having regard to the construction that we have placed upon the act and the Reference, it is neither necessary nor appropriate to discuss the other challenges to their validity and maintainability, respectively. It may, however, be said that we found the argument that the Act was public order legislation and, therefore, beyond the competence of Parliament very plausible.

161. We are indebted to the learned Attorney General for the assistance that he has rendered to the court. We are indebted to counsel who have appeared in these matters; if we single out Mr. R.K. Garg, it is because of his untimely demise.

162. Before we pass final orders, some observations of a general nature appear to be in order. Hinduism is tolerant faith. It is that tolerance that has enabled Islam, Christianity, Zoroastrianism, Judaism, Buddhism, Jainism and Sikhism to find shelter and support upon this land. We have no doubt that the moderate Hindu has little taste for the tearing down of the place of worship of another to replace it with a temple. It is our fervent hope that moderate opinion shall find general expression and that communal brotherhood shall bring to the dispute at Ayodhya an amicable solution long before the courts resolve it.

163. To quote Gandhiji again, "India cannot cease to be one nation because people belonging to different religions live in it... In no part of the world are one nationality and one religion synonymous terms, nor has it ever been so in India."

164. The Acquisition of Certain Area at Ayodhya Act, 1993, is struck down as being unconstitutional. The writ petitions impugning the validity of the Act are allowed. The issues in the suits in the Allahabad High court withdrawn for trial to this court are answered accordingly.

165. The Presidential Reference is returned respectfully, unanswered.

166. There shall be no order as to costs.

(A.M. AHMADI) J.

(S.P. BHARUCHA) J.

New Delhi
October 24, 1994.

COMMENTARIES

Delaying the Inevitable

SWAPAN DASGUPTA

In American courtroom dramas, it is familiar for a defendant to take shelter behind the Fifth Amendment and refuse to answer questions on the ground that it may incriminate him. It would, however, be novel for the presiding judge to invoke the Fifth.

In an unintended sort of way, this is what seems to have happened in the Supreme Court's recent judgement on the Ayodhya dispute. Asked by the President to give its opinion on whether or not a temple predated the Babri Masjid on the contentious site in Ayodhya, the Supreme Court returned the reference under Section 143 of the Constitution "unanswered". While the majority of the five-member Constitution bench deemed the reference "superfluous" and "unnecessary", Justices Ahmadi and Bharucha refused to entertain the reference because it was seen to "favour one religious community and disfavour another". Read along with the minority judgement's belief that "the moderate Hindu has little taste for the tearing down of the place of worship of another to replace it with a temple", it is difficult to avoid the conclusion that the President's query was avoided because the evidence may have prompted an unavoidable Yes.

True, there is merit in the contention that the Apex Court was wise to avoid getting involved in what is primarily a larger political question. It is, after all, no state secret that the Prime Minister aimed at using the Presidential reference to give judicial sanction to a tacit decision to facilitate temple construction through the so-called "apolitical" Sringeri-Dwarka trust.

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However, it is one thing for the Supreme Court to stay above politics and confine itself to narrow questions of law. The verdict of the Court assumes a different complexion when it draws its own conclusions about the meaning of the BJP defeat in the November 1993 Assembly elections in Uttar Pradesh, characterises the kar sevaks who were responsible for the December 6 demolition as "criminals" bereft of "religion, caste or creed", and pronounces that the "Hindu community must ... bear the cross on its chest for the misdeed of the miscreants reasonably suspected to belong to their religious fold".

The Court has, without doubt, adequate reason to feel let down by the Kalyan Singh Government's inability to prevent the demolition of the Babri structure. But this violation of the rule of law is a subject of criminal proceedings in a Lucknow court for which the VHP and BJP leaders have expressed their readiness to serve prison sentences, if convicted. Under the circumstances, was the Supreme Court being hasty in prejudging the issue and asking the Hindu community to bear the cross on its chest? And that too without hearing the other side.

If a case of such importance cannot be separated from its wider context, as the Constitution bench rightly felt, should it not have taken into account the sense of exasperation that accompanied the failure of the subordinate courts to resolve outstanding litigation dating back to as far as 1950? The Constitution bench's observations on the socio-political dislocation caused by delayed justice would have been very pertinent.

The Court should, for example, have considered a view prevalent in political circles that a judgement by the Allahabad High Court on the Kalyan Singh Government's Land Acquisition Act before December 6, 1992 may have tempered the militancy of the kar sevaks and not left them with an impression of being cornered. After all, in its order of November 15, 1991, the Apex Court had assured litigants that the High Court "is taking the case for final disposal some time in December of this year". A failure to meet the deadline by a few weeks is understandable. But when "December of this year" stretches to "December next year", some explanation is called for.

Maybe the Supreme Court should also have considered the Allahabad High Court's observations on April 26, 1955 that it "is very desirable that a suit of this kind is decided as soon as possible and it is regretted that it remained undecided for four years". It is a commentary on the state of judicial administration that whereas a delay of four years invited unfavourable comment in 1955, a 44 year indecision does not warrant even a passing mention in 1994. Ironically, the case is still undecided.

Moreover, if the 1993 electoral verdict in UP is relevant for justifying a perception of the kar sevaks as "criminals", should the election of a BJP Government in 1991 on the promise to facilitate construction of a Ram temple be a mitigating factor? The 1991 verdict was, after all, the last available point of reference for the "criminals" who demolished the disputed structure. Conversely, had the BJP emerged triumphant in the November 1993 Assembly elections, would the Court have tempered its harsh observations? Whatever the answer, the Supreme Court's reasoning has already prompted the BJP-VHP to conclude that the construction of the Ram temple will have to await a Hindu-friendly Government at the Centre.

Nor is such a conclusion unwarranted. Despite the apparent contradiction behind the Court's direction that an issue which created a "religious storm" should be treated like any other property dispute, the verdict has indicated that there is a way out of the mess.

First, it has upheld the Government's acquisition of the land surrounding the erstwhile mosque. Consequently, there is already talk of the Rao Government further transferring this land to the Ramalaya trust, even as it acts as the custodian for the small patch on which the makeshift temple is situated. If that happens, the Prime Minister would be emulating the strategy of the Kalyan Singh Government — building a grand temple with an incongruous garbha griha.

Secondly, by re-endorsing the Privy Council judgement in the Lahore Shahidganj gurdwara case, the Supreme Court has, in effect, informed the Allahabad High Court that "where a mosque has been adversely possessed by non-Muslims, it lost its sacred character as a mosque. Hence the view that once a consecrated mosque, it remains always a place of worship, was not the Mahomedan law of India as approved by Indian courts." Furthermore, the majority judgment is categorical that "the acquisition of any religious place is to be made in unusual and extraordinary situations for a larger national purpose, keeping in view that such acquisition should not result in extinction of the right to practise the religion".

With exceptional caution and an exaggerated sense of political correctness, the Supreme Court has tacitly endorsed the opinion of the famous American jurist, Oliver Wendell Holmes, that the "first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside the law, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution". No wonder the Court distanced itself from the minority judgement's spectacular assertion that "It is impermissable under the provisions of the Constitution for the state to acquire a place of worship to preserve public order". In effect, the Supreme Court has deemed that the principle of secularism is tempered in its application by concrete socio-political realities, notably the popular will. Hence its rather tortured permission to Hindus to continue to worship at the makeshift Ram temple.

Arguably, the Court may have reacted differently had the Places of Worship Act declaring August 15, 1947 as the cut-off date for determining the character of a shrine, not been in place. But for the moment, the implication of its verdict on the outcome of the suits pending before the Allahabad High Court is profound. The Court appears to have conceded that the Babri structure had, after more than four decades of uninterrupted possession by Hindus, "lost its sacred character as a mosque". Moreover, since Islam in India is not, and was never, dependent on the right to offer namaz in Ayodhya, the Government has the right to act in a manner befitting the "unusual and extraordinary" situation.

In short, this means the right to facilitate the construction of the Ram temple, after going through the cumbersome legal process and satisfying the litigants that they got a just and patient hearing. The Supreme Court has recognised the validity of Hindu sentiment, but it has denied them the euphoria of triumph by issuing a post-dated cheque — the punishment for jumping the gun on December 6, 1992.

The punishment may well be warranted, even if there were extenuating circumstances. But it is worth considering whether their Lordships would have been as forthright in declaring that the disputed shrine had "lost its sacred character as a mosque" had Mir Baqi's structure remained in place. Would any government have had the will to preside over a legal demolition or relocation?

In any stable society, criminals are the scum. In nations struggling to come to terms with itself, however, criminals of today have an uncanny habit of emerging as heroes of tomorrow. It has happened in India before, and the process is unlikely to cease.

On the Decision Not to Decide

M. RAMA JOIS

"Decided not to decide" the crucial question referred for its opinion by the President of India under Article 143 of the Constitution, is the sum and substance of the judgement of the Supreme Court in Special Reference No.1/1993 made under Article 143(1) of the Constitution in which the President sought the opinion of the Supreme Court on the following question:

> "Whether a Hindu Temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi-Babri Masjid (including the premises of the inner and outer courtyards of such structure) in the areas on which the structure stood?"

The above Reference was made on 7th January 1993 after the Parliament enacted the Acquisition of Certain Area at Ayodhya Act, 1993, to provide for the acquisition of certain areas at Ayodhya and for matters connected therewith. The crucial sections of the Act are Section 3 and Section 4. They read:

3. ACQUISITION OF RIGHTS IN RESPECT OF CERTAIN AREA:

> On and from the commencement of this Act, the right, title and interest in relation to the area shall, by virtue of this Act, stand transferred to, and vest in the Central Government.

4. GENERAL EFFECT OF VESTING:

> 1. The area shall be deemed to include all assets, rights, leaseholds, powers, authority and privileges and all property, movable and immovable, including lands, buildings, structures, shops of whatever nature or

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> other properties and all other rights and interests in, or arising out of, such properties as were immediately before the commencement of this Act in the ownership, possession, power or control of any person or the State Government of Uttar Pradesh, as the case may be, and all registers, maps, plans, drawings and other documents of whatever nature relating thereto.
>
> 2. All properties aforesaid which have vested in the Central Government under Section 3 shall, by force of such vesting, be freed and discharged from any trust, obligation, mortgage, charge, lien and all other encumbrances affecting them and any attachment, injunction, decree or order of any court or tribunal or other authority restricting the use of such properties in any manner or appointing any receiver in respect of the whole or any part of such properties shall cease to have any effect.
>
> 3. If, on the commencement of this Act, any suit, appeal or other proceeding in respect of the right, title and interest relating to any property which has vested in the Central Government under Section 3, is pending before any court, tribunal or other authority the same shall abate.

Section 5 of the Act empowered the Central Government to take all necessary steps to secure the possession of the area which stood vested in the Central Government under Section 3. Section 6 empowered the Central Government to vest the area in any other authority or body or trustees subject to such conditions as the Central Government deemed fit to impose. This Section also provided that the body to whom the area was transferred should be deemed to have acquired all rights, title and interest in relation to the area. Section 7 of the Act provided that the property vested in the Central Government under Section 3 was to be managed by the Central Government or by a person or body of persons or trustees of any trust authorised by the Government in this behalf. Sub-section (2) of Section 7 provided that either the Central Government or a body or person in whom the power of management was given under Section 7(1) was to maintain status quo as on the date of the commencement of this Act. Section 8 provided for payment of compensation for the land acquired to persons entitled to it. Section 9 gave over-riding effect to the provisions of the Act over any other law for the time being in force.

A reading of the provisions of the Act clearly brings forth the Legislative intention. The intention was:

(i) To acquire the actual area on which the Rama Janmabhoomi-Babri Masjid structure stood before its demolition.

(ii) To acquire the adjacent strategic areas also for effectively implementing the objects and purpose of the Act.

(iii) To secure the opinion of the Supreme Court on the question as to whether any Hindu religious structure existed in the area acquired prior to the construction of the Rama Janmabhoomi-Babri Masjid structure in the year 1528 and if the answer were to be in the affirmative, hand over the area to a body or a trust which was ready and willing to comply with the conditions imposed by the Central Government.

The Union Legislature thus intended to settle a burning problem finally in conformity with the opinion of the Supreme Court.

When the law was enacted, and the Reference was made, the Nation hoped that the resolution of the five centuries old Rama Janmasthan problem was nearing as every one felt that the Apex Court would decide the question expeditiously and finally. This hope was confirmed by the orders of the Court made on 18th March 1993 and 21st September 1993. The order made on 18-3-1993 read:

> 1. Next date of hearing is on 26th March 1993.
>
> 2. Written responses regarding preliminary objections as to the maintainability, competence of the Reference and also the propriety or advisability of answering the same could be filed on or before 20th March 1993.
>
> 3. The written submissions on the merits of the issue could be filed on or before 10th of April 1993. If any one of the mentioned parties are interested in entering appearance by filing their responses, they may do so particularly in view of the wide publicity given by the 'public notice' issued by the Registrar General of the Supreme Court in various leading newspapers inside Uttar Pradesh and outside Uttar Pradesh.

In response to the above, Rama Janma Bhoomi Nyas represented by Sri. D.V. Sehgal, Senior Advocate, filed voluminous evidence in the form of a book containing 162 pages. No one else appears to have filed any statement or evidence on merits.

The Supreme Court had made the other order on the application of one of the parties on 21-9-1993, which read:

> Accordingly, these Interlocutory Applications are disposed of with a direction to the Union Government, the State of Uttar Pradesh and authorised persons to make proper arrangements for preserving and conserving the archaeological objects in their possession, allegedly relating to the disputed structure, in an appropriate manner. The preservation shall be made according to the accepted scientific standards relating to such objects and, if necessary, in consultation with the Archaeological Survey of India.
>
> We also direct that 'estampages' of the inscriptions on these articles may be taken and preserved by the authorities in consultation with the Archaeological Survey of India in a manner acceptable to and approved by the Archaeological Survey of India. One set of 'estampages' so obtained shall be preserved in a sealed cover. If the process of obtaining the 'estampages', in the opinion of the experts of Archaeological Survey of India, is likely to disfigure or damage the articles, the authorities in their discretion may abstain from such estampages of such objects.

Having regard to these orders the people felt that the Supreme Court would decide the issue finally, even though the opinion sought for was on a question of fact, which is expressly provided for in Article 143. It was open for the Supreme Court to appoint a commission comprising of Archaeological and Historical experts to give a report and to hear the counsels for the parties about the correctness and acceptability of such a report. It could have even recorded evidence both documentary and oral as the issue was an extraordinary one affecting the whole Nation.

But the judgement delivered one year and nine months after the date of Reference was disappointing, and the hope of an early settlement of the problem receded. The Apex Court 'decided not to decide' and left the issue to be decided by the very courts which had failed to decide for over four decades. One wonders whether the Lower Courts would decide the issue, at any rate in the near future, when the Apex Court decided not to decide the issue.

The question therefore arises whether there were compelling reasons for the Supreme Court to hold that the Reference was superfluous.

The opinion of the Supreme Court that the Reference was superfluous, flows from the interpretation of the word "VEST" used in Section 3 of the Act, as not absolute vesting and on that basis holding that sub-section (3) of Section 4 of the Act which provided for abatement of all legal proceedings relating to disputed area was invalid. The Supreme Court after taking note of the fact that the word "vest" carries different meanings under different circumstances was of the view that under certain circumstances it could mean absolute vesting and in certain other situations it could mean that there was no absolute vesting. If the word "vest" used in Section 3 had the effect of vesting the entire area acquired in the Central Government absolutely, then the provisions of sub-section (3) of Section 4 which provided for abatement of all legal proceedings relating to acquired property pending before the various courts would be valid. This is evident from the following observation in the judgement:

> Section 3 has to be determined in the light of the text of the statute and the purpose of its use. *If the vesting be absolute being unlimited in any manner, there can be no limitation on the right to transfer or manage the acquired property. In the event of absolute vesting, there is no need for a provision enabling the making of transfer after acquisition of the property, right to transfer being a necessary incident of absolute title.*

Having regard to the language of Section 3 read with other provisions of the Act, which authorised the Central Government to transfer the acquired land to the persons who were found entitled to it in the light of the opinion furnished by the Supreme Court in response to the Reference, the Court held that it was clear that there was no absolute vesting of the disputed area (place on which the Rama Janmabhoomi-Babri Masjid structure stood) and therefore the abatement of proceedings provided for under sub-section (3) of Section 4 without providing for alternative dispute resolution mechanism was invalid. The relevant finding reads:

> The vesting of the said disputed area in the Central Government by virtue of Section 3 of the Act is limited, as a statutory receiver, with the duty for its management and administration according to Section 7 requiring maintenance of status quo therein under sub-section (2) of Section 7 of the Act. The duty of the Central Government as the statutory receiver is to hand over the disputed area in accordance with Section 6 of the Act, in terms of the adjudication made in the suits for implementation of the final decision therein. This is the purpose for which the disputed area has been so acquired.

> Sub-section (3) of Section 4 of the Act abates all pending suits and legal proceedings without providing for an alternative dispute resolution mechanism for resolution of the dispute between the parties thereto. This is an extinction of the judicial remedy for resolution of the dispute amounting to negation of rule of law. Sub-section (3) of Section 4 of the Act is, therefore, unconstitutional and invalid.

As regards the other adjoining areas acquired under the same section, the Supreme Court held that it was good as it was for a National purpose and further that the vesting of that land in the Central Government was absolute. The relevant portion reads:

> *The remaining entire property acquired under the Act is such over which no title is claimed by the Muslims. A large part thereof comprises of properties of Hindus of which the title is not even in dispute...*
>
> *It is clear that one of the purposes of the acquisition of the adjacent properties is the ensurement of the effective enjoyment of the disputed site by the Muslim community in the event of its success in the litigation; and acquisition of the adjacent area is incidental to the main purpose and cannot be termed unreasonable. The "Manas Bhawan" and "Sita ki Rasoi" both belonging to the Hindus,* are buildings which closely overlook the dispute site and are acquired because they are strategic in locations in relation to the disputed area. The necessity of acquiring adjacent temples or religious buildings in view of their proximity to the disputed structure area, which forms a unique class by itself, is permissible ... The vesting of the adjacent area, other than the disputed area, acquired by the Act in the Central Government by virtue of Section 3 of the Act is absolute with the power of management and administration thereof in accordance with sub-section (1) of Section 7 of the Act, till its further vesting in any authority or other body or trustees of any trust in accordance with Section 6 of the Act. The further vesting of the adjacent areas, other than the disputed area, in accordance with Section 6 of the Act has to be made at the time and in the manner indicated, in view of the purpose of its acquisition.

Thus, the word "vest" used in the same section is given different and contradictory meaning, in that in respect of the 'disputed area' the meaning given is that the vesting is not absolute and in respect of the adjacent area the meaning given is that the vesting is absolute.

Having come to the conclusion that there was no absolute vesting of the disputed area — and it was made the basis to hold that on account of there being no absolute vesting, sub-section (3) of Section 4 which provided for abatement of title suits without providing for alternative dispute resolution mechanism was invalid — this in turn was made the basis to hold that the reference is superfluous as the legal proceedings revive.

(i) It is a well settled rule of interpretation that if there are two plausible interpretations of a provision, one sustaining the constitutionality of the provision and the other leading to its unconstitutionality, the former should be adopted and the latter should be avoided. Expounding this principle the Supreme Court in the case of CORPORATION OF CALCUTTA Vs. LIBERTY CINEMA (A.I.R. 1965 S.C. 1107) AT PAGE 1113 PARA 9, said thus:

> "It may also be stated that a statute has to be read so as to make it valid and, if possible an interpretation leading to a contrary position should be avoided."

On this principle, even on the basis the word "vest", used in Section 3 could mean either absolute vesting or conditional vesting, as the latter leads to unconstitutionality of sub-section (3) of Section 4 of the Act, it should have been avoided.

(ii) Further, the meaning of the word "vest" in Section 3 should have been understood in such a way that it is in harmony with sub-section (3) of Section 4 of the Act. As sub-section (3) of Section 4 provided for abatement of all legal proceedings regarding right, title, interest relating to the disputed area, the meaning of the word "vest" in Section 3 in the sense of absolute vesting, being in harmony with that sub-section rather than understanding it as not absolute vesting, the former should have been accepted, as it is also a well settled rule of interpretation that an interpretation which advances the remedy sought to be provided for rather than the one which defeats it, should be preferred.

(iii) Another well settled rule of interpretation is that a meaning which is in conformity with the Legislative intention should be given to a statute and the Legislature intention should be ascertained by reading all the provisions together. In other words, not only the text but also the context should be the guiding factor for ascertaining the true meaning of Legislation. (*SEE* RESERVE

BANK OF INDIA Vs. PEERLESS CO. (1987 (1) S.C.C 424 PARA 33).

Unmistakably, the intention of the Parliament was:

(i) To acquire the property and vest it in the Government of India.

(ii) To ascertain the opinion of the Supreme Court on the plea of the Hindus that the disputed area legitimately belongs to them as it is believed to be the place of birth of Sri Rama from times immemorial and a temple which existed on the site had been demolished under the orders of Babar, a Moghul emperor, in the year 1528 and a mosque was constructed on that place by his commander, Mir Baqi.

(iii) To hand over the area for construction of Rama Mandir if the plea of the Hindus was found to be sustainable by the Apex Court.

(iv) As there were several legal proceedings pending before the Allahabad High Court and other subordinate courts in U.P., to bring to an end all such disputes so that the Apex Court could give its findings.

This being the clear intention of the Parliament discernible from the various provisions of the Act, with utmost respect to the Supreme Court, I submit that it should have held that:

(i) Vesting of the disputed area under Section 3 in the Central Government was absolute.

(ii) Abatement of legal proceedings provided for under subsection (3) of Section 4 was valid.

(iii) The Reference was not superfluous.

The result of the view taken by the majority of judges is that the Parliament had incorporated an inbuilt mechanism in the Ayodhya Act which defeats its own intention. An interpretation which leads to such a result should not have been given. It is respectfully submitted that the correct view to take was that the disputed area in question absolutely vested in the Central Government together with the power to transfer the said area to any other body in the light of the opinion furnished by the Supreme Court.

However, in the course of deciding not to decide the question referred for its opinion by the President and deciding the constitutional validity of the acquisition, the Supreme Court has not only decided certain important issues, but also made some weighty observations. The question decided is about the legislative competence to acquire any land to solve a National problem. The conclusion on this aspect may be summarised thus:

A. "It is competent for the Union Government to acquire any land or building/place of worship belonging to any religion if it considers that the acquisition is necessary for National purposes, to wit, to solve a National problem and vest it absolutely in the Government.

B. There is no need to make any provision in such law enabling the transfer of the acquired area to any one, as such power is an incident of absolute vesting.

In view of the above conclusion, it is competent for the Union of India to enact a fresh law providing for absolute vesting and under such law to provide for abatement of all title suits pending before any court.

Further, as the vesting of the lands absolutely in the Central Government includes the right to transfer the property to any one entitled to it, as such a right is an incident on the absolute vesting, after the acquisition the Central Government can transfer the disputed area to any trust for construction of Rama Janmasthan Temple if it is of the opinion that the claim made in that regard is justified.

The Supreme Court has also opined that the most satisfactory way of resolution of the problem is by negotiation. The relevant portion of the judgement reads:

> "The hearing left us wondering why the dispute cannot be resolved in the same manner and in the same spirit in which the matter was argued, particularly when some of the participants are common and are in a position to negotiate and resolve the dispute. We do hope this hearing has been the commencement of that process which will ensure an amicable resolution of the dispute and it will not end with the hearing of this matter. This is a matter suited essentially to resolution by negotiations which does not end in a winner and a loser while adjudication leads to that end. It is

> in the national interest that there is no loser at the end of the process adopted for resolution of the dispute so that the final outcome does not leave behind any rancour in anyone. This can be achieved by a negotiated solution on the basis of which a decree can be obtained in terms of such solution in these suits. Unless a solution is found which leaves everyone happy, that cannot be the beginning for continued harmony between "we the people of India."

These weighty observations give the clue as to why the Supreme Court 'decided not to decide' and rendered the reference superfluous instead of holding that the vesting of disputed area was absolute and the reference was maintainable, though such a view is more in consonance with legislative intention than the one given by the Supreme Court. There can be no two opinions that the best solution in National interest, lies neither in adjudication nor in legislation but in conciliation. But it is only after failure of efforts for conciliation made by several persons and lastly at the Prime Ministers' level, which is well known and alluded to in the *White Paper,* that the method of adjudication was resorted to. Therefore, even if the Supreme Court considered that reverting back to the method of conciliation was the best in National interest, the Supreme Court itself could have asked the counsel for the parties to use their good offices to bring about an amicable settlement as there was sufficient time in between the dates on which the matter was heard. This would have put a great moral pressure on the parties and might have led to a settlement.

In fact, in many cases the Supreme Court asks or persuades the parties to settle their disputes amicably. Therefore, such an effort should have been made by the Apex Court in this case, as it is threatening the unity of the Nation.

If that had failed, then the Supreme Court should have considered all the evidence made available to the Court. The Court could have also secured opinion of the archaeological experts and furnished its opinion on the question referred for its opinion by the President under Article 143 (1) of the Constitution, which reads:

> 143. **Power of President to consult Supreme Court:** (1) If at any time it appears to the President that a *question of law or fact* has arisen, or is likely to arise, which is of such a nature and of such public importance

> that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

Having regard to the language of the Article, the President had acted within his powers in seeking the opinion of the Supreme Court on a question of fact of great magnitude which has become one of the biggest problems of the Nation. The object and purpose of the Reference was to settle the issue finally, once for all and as early as possible in the light of the opinion of the Apex Court for:

FIRSTLY, the lower courts which have not decided the cases for three to four decades are not likely to decide them in the near future;

SECONDLY, if and when they decide the matter, the matter would come in appeal and ultimately the Supreme Court itself would be called upon to decide it;

THIRDLY, the Nation cannot afford to allow a dispute of this nature to prolong as doing so would be at the cost of National unity.

When the hearing of the Reference made with the aforesaid object and purpose started and the Court called upon the parties to file written submissions on merits on or before 10th April 1993, the people thought that the beginning of the end of the vexed problem had started. But to their dismay at the end they saw the beginning of the problem again. Had the Supreme Court given its final verdict, it would have been recorded in golden letters in our judicial history. But unfortunately the Supreme Court did not utilize this golden opportunity.

Judicial Backlash

ARUN JAITLEY

Those who demolished the disputed structure in Ayodhya certainly did disservice to the very cause that they went there to espouse. The act of demolition violated judicial injunctions. This challenge to the majesty of the law has resulted in a judicial backlash which was reflected in the judgement of the Supreme Court in the S.R. Bommai case wherein dismissal of the BJP governments in the States was upheld. Even while declining to answer the Presidential Reference on the Ayodhya dispute this backlash is quite evident.

The majority judgement in the Ayodhya Reference, while upholding the interim arrangement wherein the Central Government acts as the statutory receiver of the disputed land, relegates the resolution of the dispute over the disputed land back to the suits pending before the Full Bench of the Allahabad High Court in Lucknow. The process of reasoning by which the Court has arrived at this conclusion is based on a fundamental error. The Court has wrongly framed the core question in relation to the Ayodhya dispute, and having thus framed a wrong question it obviously could not arrive at the correct response.

For any civilized and acceptable solution to the Ayodhya tangle, the core question has to be, "What was the original character of the disputed place of worship?" Even though matters of faith and matters relating to existence of Shri Rama etc. are not judicially determinable, nonetheless any judicial tribunal or court

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can by assessment of historical and archaeological evidence arrive at an answer to the question framed above. Historians and archaeologists can certainly determine the original character of this place of worship. If the original character was indeed a mosque, in that event the argument that Mir Baqi converted a Hindu temple into a mosque would have to be rejected. Similarly, if the original character was that of a temple, the argument that the same was converted into a mosque a long time ago would be as uncivilized as the act of demolition on December 6, 1992 is made out to be in some quarters. Spokesmen of Islam in this country maintain that Islamic scriptures do not permit the construction of a mosque at a place where another place of worship had existed earlier. Thus, the real solution to the Ayodhya issue lies in determining what the original character was of the said place of worship. This could certainly have been answered in the Reference before the Supreme Court. It is a question which is capable of determination. It can be determined by judicially measurable standards.

On the other hand, if this real question is not determined, the suits pending in the Allahabad High Court, besides having a potential to go on and on for an indefinite period, can never bring an acceptable and lasting solution to the Ayodhya problem. If Hindus were to succeed today in the suits pending at Lucknow, they would succeed primarily on the ground that the suits filed by the Muslim organisations are barred by time. On the other hand, if the Muslims were to succeed in the said suits, their success would depend upon the acceptance of an argument that even if Mir Baqi had forcibly converted a temple into a mosque, 400 years of adverse possession gives them a legal title on the disputed site. A judgement based either on the law of limitation or on the principle of adverse possession may make sound legal sense, but it cannot help to put an end to the socially corrosive issue which has haunted Indian society for long. Ayodhya is far from being a mere property dispute. It sways the minds and hearts of crores of Indians. Thus, legal technicalities alone cannot resolve the Ayodhya issue.

Unfortunately, the Supreme Court judgement frames an incorrect question for determination. The majority view insofar as it strikes down Section 4(3) of the Acquisition of Certain Area in Ayodhya Act, 1993, relating to the abatement of all pending suits and legal proceedings, does so on the basis that, "This also results in extinction of several defences raised by the Muslim community, including that of an adverse possession of the disputed area for over 400 years since the construction of the mosque there in 1528 AD by Mir Baqi. Ostensibly, the alternate dispute-resolution mechanism adopted is that of a simultaneous Reference made the same day under Article 143(1) of the Constitution to this Court for decision of the issue of the question referred. It is clear from the issues framed in those suits that the *core* question for determination in the suits is not covered by the Reference made and it also does not include therein the defences raised by the Muslim community. It is also clear that the answer to the *core* question for determination in the pending suits will not, by itself, resolve the long-standing dispute relating to the disputed areas. Reference made under Article 143(1) cannot, therefore, be treated as an effective alternate dispute resolution mechanism in substitution of the pending suits which are abated by Section 4(3) of the Act."

The error in the Court's approach is evident from the foregoing logic. The Court is not prepared to treat the determination of the original character of the place of worship as the *core* question. The Court permits a wrong to continue by seeing the core question to be "the right of a community to forcibly convert a place of worship and acquire an adverse possession by passage of time". The Court, having framed the wrong question, could not have arrived at the correct answer.

The backlash on account of which the Court has embraced this approach is reflected in several other observations made in the judgement. Thus, the Court has observed in relation to December 6, 1992 incident that "what was demolished was not merely an ancient structure, but the faith of the minority in the sense of justice and fair play of the majority". The Court misses the basic point that it is in effect because of the sense of justice and fair play of the majority community in India that secularism,

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that is *Sarva Dharma Sambhava*, is a way of life in India. It is essentially on account of this liberal secular approach of the majority that minorities in India enjoy equality, in fact even several special constitutional rights. This is, if one may add, in direct contrast to the theocratic states in India's neighbourhood and farther afield in West Asia, for that matter in some Western countries too.

However, the Court itself contradicts its own analysis of the demolition subsequently in the judgement by observing: "It is also pertinent to bear in mind that persons responsible for demolition of the mosque on 6th December, 1992, were some miscreants who cannot be identified and equated with the entire Hindu community and, therefore, the act of vandalism so perpetrated by the miscreants cannot be treated as an act of the entire Hindu community for the purpose of adjudging the constitutionality of the enactment. Strong reaction against, and condemnation by the Hindus of the demolition of the structure in general, bears eloquent testimony to this fact. Rejection of Bharatiya Janata Party at the hustings in the subsequent elections in Uttar Pradesh is another circumstance to that effect."

For the Court to don the robe of a political analyst is indeed a new phenomenon. The Court should never follow or analyse the contents of a ballot box. This creates a tendency to be swayed by the times. In the State assembly elections held in November 1993, the BJP actually increased its share of votes by three per cent over what it had polled in 1991. It got a smaller number of seats due to multiple factors working against it. While continuing the newly-discovered role for itself, the Court subsequently observes that during the interim period worship of the Hindu idols should continue because stopping the same will not bring solace to the Muslims whose feelings after the demolition must be assuaged. The Court then notes with particular satisfaction that a large number of lawyers belonging to religious communities other than Muslims have espoused the cause of the mosque. The Court observes, "It was particularly heartening to find that the cause of Muslim community was forcefully advocated by the members of the Bar belonging to the other communities." One wonders if the Court noticed the complete absence of reciprocity on the part of lawyers belonging to the Muslim community. This absence of reciprocity is evident not only in the Court proceedings, but also in the endeavour to find a possible solution wherein there is respect for what the majority regards as its Mecca.

In short, the highest Court in the land missed an opportunity to be a beacon to the entire community — first when the politicians seemed to have let it down and the intellectuals were groping in the dark in search of an acceptable solution, and now again when the State itself had turned to it for guidance.

If Only the Court had Examined the Evidence

S.P. GUPTA

It is indeed a great pity that the Supreme Court has declined to examine the evidence on the question which had been referred to it by the President. Had it deigned to study it, it would have found it conclusive, and its imprimatur would have gone a long way towards quietening the clap-trap of "secular" "academics". In brief, the position is as follows.

Background

From 1975 through 1980, the Archaeological Survey of India under the Directorship of Prof. B.B. Lal, a former Director General of the Survey, undertook an extensive programme of excavations at Ayodhya, including the very mound of the Ramajanmabhumi on which the so-called 'Janmasthan Masjid' or Babri Mosque once stood and later demolished on 6th December 1992.

At Ayodhya Prof. Lal took as many as 14 trenches at different places in order to ascertain the antiquity of the site. It was then found that the history of the township was at least three thousand years old, if not more, and that at Ramajanmabhumi there stood a huge structure on a parallel series of square pillar-bases built of several courses of bricks and stones. When seen in the light of 20 black stone pillars, 16 of which were found re-used and standing in position as corner stones of piers for the disputed

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domed structure of the 'mosque', Prof. Lal felt that the pillar-bases may have belonged to a Hindu temple built on archaeological levels formed prior to the 13th century AD since the debris layers which had finally sealed the destroyed structure contained medieval blue and red glazed ware pottery pieces, glazed ware bangles, a small stone sculpture etc., the date of which falls precisely between 13th and 16th centuries AD. He also found a door-jamb carved with Hindu icons and decorative motifs of *yakshas, yakshīs, kīrtimukhas, purṇaghaṭṭas,* double lotus flowers etc.

Lal's Discoveries at Ramajanmabhumi

✓ Lal's excavations also established the fact that the pillared structure underwent repeated repairs, at least three times, hence it may show the history of the pillared temple spanning two to three centuries on a very rough estimate, which, of course, is corroborated by evidences of pottery, building materials, smaller antiquities, etc. Lal's excavations also showed the existence of a huge fortification wall at the back of Ramajanmabhumi, built of burnt bricks, and going as far back in time as 3rd century BC. Lal's trenches laid along the southern boundary wall of the disputed structure also showed the presence of a number of medieval floors, basins and other structures using pink lime and pottery grit. It is common knowledge that in archaeology there is always an element of luck — one may just miss a treasure by inches. Prof. Lal had a hard luck at Ramajanmabhumi. His southern trenches missed a huge pit with 40 and odd sculptures just by 10 to 12 feet. But he did get the pillar-bases of the pre-16th century demolished–temple which others did not get.

Excavations and Fresh Discoveries:Gupta-Srivastava

On the 2nd of July 1992 another team of archaeologists, consisting of Dr. Y.D. Sharma, a former Deputy Director General of the Survey, Dr. K.M. Srivastava, a former Director of the Survey, Dr. S.P. Gupta, a former Director of Allahabad Museum, and several other senior archaeologists went to the site of

Ramajanmabhumi. This team went to examine the 40 and odd art and architectural fragments of an ancient Hindu temple which had been found there in an ancient pit by the officials of the Government of Uttar Pradesh who were engaged in levelling the ground on the eastern and the southern flanks of the Ramajanmabhumi, and which had been reported widely in the newspapers from the 18th June 1992. The team found that the objects were datable to the period ranging from the 10th through the 12th century AD, i.e., the period of the Late Pratiharas and Early Gahadvals. The kings of these two dynasties hailing from Kannauj had ruled over Avadha and eastern Uttar Pradesh successively during this period.

Temple Remains

These objects included a number of *āmalakas,* i.e., the cogged-wheel type architectural element which crown the *bhūmi shikharas* or spires of subsidiary shrines, as well as the top of the spire of the main *shikhara* or pyramidal structure built over the *garbha-griha* or *sanctum sanctorum* in which the image of the principal deity is kept and worshipped. This is a characteristic feature of all north Indian temples of the early medieval period and no one can ever miss it — it is there in the Orissa temples, such as Konarka, in the temples of Madhya Pradesh such as Khajuraho and in the temples of Rajasthan such as Osian.

Nearly a month after the demolition of the disputed structure, on Ist January 1993 to be exact, an identical *āmalaka* was found in a pit dug by the U.P. officials in the presence of the S.S.P. Faizabad when they were engaged in erecting a fresh barricade round the temple.

The art objects found at Ramajanmabhumi also included fragments of various types of *jāla* or mesh-like decorations which adorned the spire. There are also several types of cornices, pillar capitals, mouldings as well as door-jambs with meandering floral patterns. The images of *chakrapurusha, Parashurama, mātridevī, Shiva* and *Pārvatī*, etc. provide further proof to their being members of a 10th-12th century Hindu temple-complex.

Fresh Discoveries

The team of archaeologists at a subsequent date undertook a couple of exploratory trenches at the eastern periphery of the Janmabhumi site, and also scraped the more than 10 ft. thick eastern and southern sections which had been cut across the Janmabhumi mound by the Government officials. It located a huge deep pit in which all the 40 and odd fragments of an ancient Hindu temple were initially thrown, obviously thrown as unusables when the mosque was being built. It also found the remains of at least three rammed floors datable to three different phases of the time-bracket between 10th and 16th centuries, and one floor of the Kushana period (1st-3rd centuries). Two walls built of several courses of burnt-bricks belonging to the Kushana period also came to light. A huge and sprawling flooring of burnt bricks was located by Prof. B.R. Grover.

The discovery of a number of Kushana period terracotta images of gods and goddesses earlier made it clear, first, that at the Janmabhumi site Hindu temples were built several times during the last 2000 years with the interval of only about 450 years, from 1528 through 1992, when the Muslims destroyed the temple and occupied the site and also built a new structure they called 'Janmasthan Masjid' in their own records; secondly, that the last time a huge stone temple was built at the site is to be dated between the 11th and 12th centuries on the basis of the art style of the sculptures, even though on the basis of the style of some weathered sculptures, it can safely be said that a stone temple of the 9th-10th century, belonging to the Pratihara style, must have been present at this very place when during the Gahadval period a new and magnificent temple was attempted. In fact, it was, in a sense, *jīrṇoddhāra.* And finally, that the temple was destroyed sometimes after the 13th century AD, in every likelihood in the early 16th century, as is fully borne out by the inscriptions of Mir Baqi found fixed in the disputed structure far back in time, during the British days as is clear from the accounts given by Mrs. A. Beveridge in her translation of *Babur-Nama* published in 1926.

Now, what do the archaeologists say? In order to seek the opinion of leading archaeologists of the country on all these issues and also to give them an opportunity to see and handle the objects for themselves as well as to explore and locate more archaeological facts at the site, the Indian History and Culture Society arranged a three-day (10th October 1992 through 13th October 1992) all-India workshop and seminar on 'Archaeology and History of Ayodhya' in the main hall of the Tulsi Smarak Bhawan at Ayodhya. The conference was attended by as many as 40 delegates, coming from Madras (Prof K.V. Raman), Dharwar (Prof. A. Sundara), Banglore (Dr. S.R. Rao), Ahmedabad (Prof. R.N. Mehta), Jaipur (Shri R.C. Agrawal), Sagar (Dr. S.K. Pandey), Nagpur (Prof. Ajaya Mitra Shastri), Varanasi (Dr. T.P. Verma), Faizabad (Prof. K.P. Nautiyal), Patna (Prof. B.P. Sinha), Bhopal (Dr. Sudha Malaiya), Delhi (Prof. K.S. Lal and Devendra Swaroop), Allahabad (Prof. V.D. Mishra), Rewa (Prof. R.K. Verma) and several others, including Y.D. Sharma, K.M. Srivastava and S.P. Gupta, the excavators and explorers of Ayodhya. They not only came to the same conclusions as we had arrived at earlier but added at least two more and most vital pieces of archaeological evidence — one, epigraphical and second, architectural. The former or epigraphical evidence, is the letter *'si'* found engraved on the top portion of the black stone pillar fixed on the outer left side of the main entrance to the central domed-room. Palaeographically, it is in the Nagari script of the 11th-12th century AD. In Sanskrit it stands for *'Shrī'*, the Goddess Lakshmi. Or else it was the 'mason's mark', as archaeologists describe it, which simply means that it was the first letter of the name of the mason who had carved the pillar. The importance of this discovery was far-reaching at that point of time because what was surmised by us on art-stylistic and architectural grounds was now conclusively proved on epigraphical grounds, namely, that the black stone pillars belonged to a temple of the 12th century AD. The latter or the architectural evidence, came to light in the form of a fragmentary wall over which ran the outer boundary wall of the disputed structure. It means that the Muslims used a part of the temple wall to build the boundary wall of the mosque.

One More Inscribed Pillar

A year later, an identical piece of evidence came to light when the author visited the hospital region in the contonment area of Faizabad along with Prof. B.R. Grover, Shri Devendra Swaroop and others. There a similar black stone-pillar inscribed with the same letter *(si)* in the same location on the pillar, the capital, was found re-erected in a small triangular park; we now gather that the military commander has, of late, shifted it to his own official residence and re-erected it in the court-yard.

The seminar proved to be a landmark in the history of Indian archaeology as never before had Indian archaeologists been called upon to examine for themselves archaeological evidence on a subject which was so very vital for the political future of the country and which had shaken other countries also including Pakistan, Bangladesh, the two immediate Islamic countries where even the legally erected temples, including the new ones, were destroyed.

Subsequent discoveries

And then, in less than two months, came the doomsday — on 6th December 1992, the structure disputed for over four centuries was demolished by the furious mass of those very Hindus whom recent history had written off as the 'most docile race' on the face of the earth. From the huge debris, the few 'karsevaks' or the volunteers of Vishwa Hindu Parishad, who had learnt from the publications and the news-items published in the national dailies from almost January 1991 about the historical importance of every bit of archaeological remains at the Ramajanmabhumi site, picked up in the evening and the night of 6th December at random those stone pieces, around 250 and odd, which had some carving over them and then dumped them in between the two rows of semi-*pucca* houses, built by the VHP for their offices some 200 meters away, towards the south from the Janmabhumi mound; the VHP called it 'Rama Katha Kunj'.

Not all were ancient, since scores of them, generally rectangular marble tiles, bore the dedicatory inscriptions in Devanagari script of the 20th century. However, at least three dozens of them were certainly ancient, belonging to the period bracketed between 10th and 12th centuries AD. Two of these are fragmentary and datable palaeographically to a period fifty years later than the third inscription. These were found deeply and clearly cut and engraved on a pillar, unfortunately found broken vertically in two parts — the one we found, therefore, has only half sentences, the missing parts of the inscriptions must be there on the other piece, not available to us so far. One of these inscriptions, on the top portion, is in 8 lines, while the other inscription, on the bottom of the pillar is preserved only in two lines; we, however, suspect that it must also have been a long one. These fragmentary inscriptions bear the names of some Gods and some kings, in genealogical sequence, and courtiers.

The Hari-Vishṇu Inscription from Ramajanmabhumi

The third inscription is, however, the most important one for historians, archaeologists, epigraphists, saints, politicians, activist and even the masses of this country and beyond since it provides the most clinching evidence in favour of the Reference that the President of India had made to the Supreme Court.

This inscription, like the other two, is also written in Nagari script of the 12th century AD, the same script in which *'si'* or '*Shrī*' was found by R.C. Agrawal engraved on two black stone pillars, as mentioned above. This inscription, running in as many as 20 lines, is found engraved on a 5 ft. long, 2 ft. broad and 2.5 inches thick slab of buff sandstone, apparently a very heavy tablet which must have required the hands and shoulders of at least four karsevaks to get shifted from the Ramajanmabhumi. One can imagine their peril. By the time they reached the dumping ground they seem to have completely lost their balance. They practically threw it on the ground and against one of the several stones already brought and dumped there. In the process, the stone tablet got broken obliquely on the left proper — a few letters at the point of breakage are, therefore, found missing; a couple of them were found by us fallen on the ground. Three-fourths of the first line is found obliterated anciently. The last line is also not complete since it was anciently subjected to chipping off. A portion of the central part is found battered, maybe some one tried to deface it anciently. The patination is, however, uniform all over the surface, even in those areas where once there were inscriptions. About this inscription, the chairman of the Epigraphical Society of India, Prof. Ajay Mitra Shastri, has said the following, as published in *Purātattva,* the official journal of the Indian Archaeological Society, No.23 (1992-1993):

> "The inscription is composed in high-flown Sanskrit verse, except for a very small portion in prose, and is engraved in the chaste and classical Nāgarī script of the eleventh-twelfth century AD. It has yet to be fully deciphered, but the portions which have been fully deciphered and read are of great historical significance and value for our purpose here. It was evidently put up on the wall of the temple, the construction of which is recorded in the text inscribed on it. Line 15 of this inscription, for example, clearly tells us that a beautiful temple of Vishṇu-Harī, built with heaps of stone *(śilā-saṁhati-grahair)*, and beautified with a golden spire (*hiraṇya-kalaśa-śrīsundaram*) unparalleled by any other temple built by earlier kings (*pūrvvair-api-akritāni kritāni nripatibhir*) was constructed. This wonderful temple (*aty-adbhutāni*) was built in the temple-city (*vibudh-alayāni*) of Ayodhya situated in the Sāketamaṇḍala (line 17) showing that Ayodhya and Sāketa were closely connected, Sāketa being the district of which Ayodhya was a part. Line 19 describes god Vishṇu as destroying king Bali (apparently in the Vāmana manifestation) and the tenheaded personage (Daśānana, i.e., Rāvaṇa).
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> "Line 20 contains an allusion to the serious threat from the west (*pāśchātya-bhīti*), apparently posed by Sultan Subuktigin and his son Mahmud of Gazni, and its destruction by the king.
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> "The inscription was composed by the poet Āyushyachandra, son of Alhaṇa. Perhaps he was also the king and as royal poet he is said to have excelled even Sāhasāṅka and Śūdraka (line 16) and is credited with the excavation of tanks and laying of wells as well as stepped wells (line 17). In lines 7 and 11 we get a reference to a powerful king named Sallakshaṇa, who, in view of palaeographic considerations and in keeping with the extant information of the history of this period, was perhaps the Chandella king Sallakshaṇavarman who ruled at the end of the eleventh and the beginning of the twelfth century AD. It is also not impossible that there was another king of this name belonging to some other dynasty. But the inscription certainly proves the building of a magnificent temple of Hari-Vishṇu, the killer of Rāvaṇa, i.e., Rāma."

During the talks held between two groups of historians, one representing the All India Babri Masjid Action Committee and the other Vishwa Hindu Parishad, Profs. R.S. Sharma and Athar Ali of the former group once asked the members of the latter group if they had any contemporary written document to prove that there was a Rama Temple at the site of Ramajanmabhumi prior to the coming up of the Babri Masjid built by Mir Baqi in 1528 AD since without that they were not fully convinced that there was indeed a Hindu temple at the site, let alone the Rama Temple. Well, my dear learned professors, what have you to say now, except for the usual Marxist alibi that it may have been forged and then planted here ?— If so, we still stand by our old offer: the Reward of Rupees Two Lakhs to any one in the world who can forge it on a similar piece of stone and have the experts in the world take it as genuine as the present one has been accepted.

History cannot be falsified the way it is being attempted by Sharmas and Athar Alis.

A Note on the Historical Background of the Vishṇu-Hari Inscription from Ramajanmabhumi, Ayodhya

Emperor Govindachandra, during whose reign the last Rama Temple was built at Ramajanmabhumi, was the 5th king in the Gahadval Dynasty which ruled in northern India during the period bracketed between 11th and 12th centuries AD. He was the grandson of the famous Chandradeva (1090-99 AD) who is known to have defeated the Muslims and stopped them entering southern, eastern and central Uttar Pradesh. He was the son of Madanapala who had ruled from 1099 AD through 1113 AD. Govindachandra himself ruled from 1114 AD through 1154 AD over a vast area, including Avadh.

Govindachandra had an illustrious queen named Kumaradevi. She, in one of her inscriptions found at Sarnath, compared her husband with 'Hari' (same as Vishṇu) whom 'Hara' (same as Shiva) had sent to protect Varanasi from the Muslim invaders. She observes that he (Hari) named Govindachandra, had taken birth in order to protect the earth.

During the period of this emperor there were several local kings in northern India. They had emerged on the scene after the break-up of the mighty empire of the Pratihara kings (8th-10th century). This was the period when the Muslim inroad from the west was trying to secure a footing into the mainland but it was successfully resisted and thwarted by the Hindu kings of Uttar Pradesh, generally with their capital at Kannauj. The Gahadval emperors had very friendly relations with many local rulers, the primary reason why they could defeat the Muslims and keep them confined to western India.

It may be noted that besides Govindachandra, Sallakshaṇa and Abhayachandra are also mentioned. Sallakshaṇa, in all probability, was the same as Sallakshaṇvarman, the son of Kirtivarman of the Chandella dynasty of Khajuraho. Dr. T.P. Verma of the Banaras Hindu University, who is the editor of all the Gahadval inscriptions, is of the opinion that Govindachandra and Sallakshaṇa were great friends since even as a prince during the life-time of his father, Govindachandra had saved the life and honour of Sallakshaṇa. According to him, both the ruling families had entered into a matrimonial alliance.

The composer of the verses of the Hari-Vishṇu inscription from Ramajanmabhumi was Āyushchandra. Verma has identified him with the younger son of Allhaṇa. Allhaṇa had an elder brother, named Kīṭhaṇa. He was also a great Sanskrit poet and composer who composed the text of one important inscription of Govindachandra. It is possible, according to Verma, that after Kīṭhaṇa, Āyushchandra became the court-poet of Govindachandra.

His excellence has been very well compared with those of Sāhasāṅka and Śūdraka. The inscription records that he excelled both these stalwarts in Sanskrit language.

According to another view, he may have been a local ruling chief who excavated tanks, wells and stepped wells for the benefit of all. However, these acts of piety could very well have been performed by a court-poet whose position always remained very high in the eyes of the king.

Whatever may have been the fact, it is absolutely clear from this contemporary written record that the site of

Ramajanmabhumi was considered very sacred where the contemporary kings and elite built not only Hindu temples but also several types of structures which served the people who visited the holy land generation after generation.

There is, therefore, absolutely no doubt in the minds of all the unbiased historians and epigraphists, whose academic soundness and honesty have always been unchallenged, that the inscription is absolutely genuine and its contents are based upon solid historical facts and events as well as personalities round whom the history of northern India of 11th and 12th centuries AD moved.

The Ayodhya Demolition: An Evaluation

KOENRAAD ELST

On 6 December 1992, representatives of India's native religion have done away with a symbol of bigotry and foreign domination: the Babri Masjid, an abandoned mosque turned into a temple on 22 December 1949, which by its mosque architecture continued to be a symbol of Islamic iconoclasm as well as a constant invitation to Muslim fanatics to try and reoccupy it. The entire world press was only true to its usual bias against India when it depicted this historical act of national liberation as barbaric. The (Congress) Government of India equally condemned the demolition of the Babri Masjid and announced it would rebuild the structure at the same site.

However, soon after that, the same government tried a less blatantly partisan way out of the Ayodhya tangle: it requested the Supreme Court to formulate an opinion on the historical question whether the Babri Masjid had indeed been built in forcible replacement of a Hindu temple marking the Rama Janmabhoomi site at Ayodhya. The more or less clear implication was that the existence of the temple would be taken to justify rebuilding the temple at the site, while the opposite would be interpreted as justifying the rebuilding of the mosque.

The occasion for writing the present paper is the Supreme Court's reply to the government's request. After more than a

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year of deliberations, in October 1994, the Supreme Court has formally rejected this one-point Reference regarding the history of Ayodhya's disputed site. For at least three reasons, this was a correct decision. In fact, it was correct for more and better reasons than the judges themselves realised.

(i) The formal reason is the matter of competence: historical questions should be decided by impartial scholars, not by judges. This point is quite straightforward; it has been argued sufficiently and needs no further elaboration. The other two reasons, by contrast, have hardly been mentioned, let alone elaborated. We will first look into them, before going into a more general evaluation of the Ayodhya situation.

No further proof needed

The material reason why the judges were right not to entertain the historical question regarding Ayodhya, is that in this (ii) question, apart from details, there was nothing left to decide anyway. Until 1989, there was a complete consensus in all sources (Hindu, Muslim and European) which spoke out on the matter, viz. that the Babri Masjid had been built in forcible replacement of a Hindu temple. The 1989 edition of the *Encyclopedia Brittannica* (entry *Ayodhya*) puts it squarely: "There are few surviving monuments of any antiquity. Rama's birthplace is marked by a mosque, erected by the Moghul emperor Babur in 1528 on the site of an earlier temple." Apart from local tradition, architectural indications, supporting documents and archaeological evidence, this consensus had logic on its side: thousands of mosques inside and outside India do stand on demolished non-Muslim places of worship, while in every area of North India where Muslim power has reached during the Sultanate and Moghul periods, every prominent temple has been demolished. Therefore, all that the consensus claimed, was that the general rule, verified in thousands of places in India and thousands more in other countries, applied in this particular case (the central hill of the temple town of Ayodhya) as well. To affirm that the general rule also applies in a given particular case, is the most modest claim one can possibly make. He who makes the opposite claim, viz. that the given particular case forms an exception to the rule, must logically accept the burden of proof. Imp.

In normal scholarly practice, the debate on the object of such a consensus is only reopened when new evidence surfaces. Scholars have more promising questions to figure out, so they don't waste time on settled affairs. The "eminent historians" (from JNU, AMU *et al.*) who insisted on revising the consensus have not shown such evidence, no new fact nor credible new interpretation of known facts. Instead, they have constructed purely speculative hypotheses (like the British conspiracy to float demolition stories in order to "divide and rule") which are in conflict with all available knowledge and remain in need of supporting evidence themselves.

In the entire corpus of Ayodhya arguments, including the minutes of the government-sponsored debates of December-January 1990-1991 and October-November 1992 between scholars mandated by the Babri Masjid Action Committee(BMAC) and the Vishva Hindu Parishad(VHP), I have not come across any piece of evidence which would warrant the reopening of the question in any normal scholarly context. On the contrary, what new evidence has surfaced, has only confirmed the old consensus: new documentary and especially archaeological evidence confirms that a Hindu temple stood at the Babri Masjid site. The Supreme Court judges could not have added anything to this unambiguous *status quaestionis*.

Of course, some as yet undecided historical details may remain of interest to scholars. Thus, it is unlikely that the demolition which was followed by the construction of the Babri mosque, was the first temple demolition on the Rama Janmabhoomi site. The temple from which historians claim to have recovered an inscription in the Babri debris on 6 December 1992 seems to have been built around 1100 AD, i.e. well after Mahmud Ghaznavi's raids. It is most likely that before and during the Sultanate period, the Rama Janmabhoomi site suffered a fate similar to the Somnath site in Prabhas Patan, Gujarat: temple demolition followed by reconstruction followed by yet another demolition, mosque built by Muslim invaders but reclaimed by the Hindus and temporarily used as a makeshift temple, etc. The Rama Janmabhoomi site had probably been desecrated a number of times before Babar and Mir Baqi set foot in Ayodhya.

But interesting as these vicissitudes of Islamic iconoclasm in Ayodhya may be, they are immaterial to the fundamental issue: the very fact of Islamic iconoclasm as the cause of the destruction of a Hindu temple on one of the foremost sacred sites of India's native religion.

Meanwhile, the actual course of the debate both in the official forum and in the media could have suggested some conclusions even to non-historians like the Supreme Court judges. The debate has not genuinely altered the old consensus, but it has been an interesting case-study in manipulation by unscrupled academics. How else should we call the practice of seemingly learned publications advertising themselves as "objective" studies of the controversy, but systematically concealing the arguments put forth by one of the parties?

In its presentation of evidence in the government-sponsored scholars' debate in December 1990, the VHP scholars have pointed out 4 cases of attempted fraud by their opponents (removing relevant old books from libraries, adding words on an old map). That does not include any possible cases where the attempt to conceal or destroy evidence has succeeded.

Debates are not necessarily boring, sometimes they produce hilarious scenes. Thus, when the BMAC felt it had lost the first round of the government-sponsored scholars' debate (December 1990), it hired a team of four historians, through the good offices of Prof. Irfan Habib. On the very morning when they made their first appearance at the talks (24 January 1991), the newspapers reported that one of them, Prof. R.S. Sharma, had led 40 intellectuals in signing a petition affirming that there was absolutely no evidence that a temple had stood at the contentious site. But right there, he declared that he had not studied the evidence offered by the VHP scholars and needed six more weeks to do so. Moreover, though they were mandated by the BMAC, the four demanded that they be allowed to participate as "independent historians"; that they be allowed to sit in judgement on a controversy between their employer and their enemy. Of course, the government representative dismissed this demand as ridiculous; yet, the BMAC has continued to call them "the independent historians", and they themselves have continued to demand that the VHP submit its case to "independent arbitration", i.e. by their own kind.

The archaeological evidence provides another striking example of deliberate concealment of evidence. When an inscription detailing the story of the temple's 12th-century construction was found during the Babri Masjid demolition and subsequently presented by Prof. K.S. Lal and Dr. Sudha Malaiya, no less than 70 academics issued a statement demanding an investigation. So far, so good: true to their deontology, these scholars were keen on doing an epigraphical *investigation* to verify the inscription's authenticity (checking the type of script, linguistic style, authorship etc.), weren't they? No: what they wanted was a *police investigation* to find out "from where the inscription had been stolen", since they took for granted that it had to be a forgery. In the academic world, such an allegation of scientific fraud against colleagues, not based on any examination of the piece in question, would normally backfire seriously on the allegers themselves; but here it went unpunished, in fact it was widely acclaimed.

If those academics had really believed their own allegation, they would have made sure that the forgery got exposed in a proper study by an independent team of researchers invited from all over the world. Instead, they have tucked it away like a skeleton in the closet. That is where even a non-historian can easily spot the secularists' weakness in the evidence debate: for all their tough talk about the VHP standing empty-handed except for "myths", they have not dared to invite genuine outsiders[1] to join the debate.

History is not the problem

(iii) The third reason why the judges were right not to set themselves up as *ad hoc* historians, is that the controversy is not about history. This is not merely the now dominant position among secularists who won't admit but know fully well that they can't win the debate on history, and who therefore shift their ground towards reducing the conflict to a strictly judicial property dispute. It is also the view of the Muslim and Hindu claimants.

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[1] By "genuine outsiders", I do not mean Indians who are neither Muslim nor Hindu. The Christians and a section of the Sikhs have formed a kind of anti-Hindu coalition with the Muslims, as is evident from the consistently pro-Muslim position in the Ayodhya comments in the Christian press.

Muslim claimants have only started challenging the established consensus about the iconoclast origin of the Babri Masjid when secularist intellectuals taught them the tactical usefulness of that negationist position. Originally they accepted the true history,[2] but differed with other people only in their theologico-juridical conclusions. To them, a mosque is not less legitimate because it was built in forcible replacement of an idol temple, rather the contrary. They claimed the Babri Masjid because at one point it was a mosque, and regardless of that mosque's prehistory, they insist on the principle: "once a mosque, always a mosque."

The Hindus who refuse to cede the Ram Janmabhoomi site to the Muslim and secularist claimants, do so because this is a Hindu sacred site, — not because it was one in Valmiki's, or Vikramaditya's or Babar's day, but simply because it is one right now. And the problem, the cause of the post-1949 episode of the Ayodhya conflict, is not the fact that some *mujāhid* denied them the right to their own sacred site sometime in the Middle Ages, but that Muslim and secularist politicians are denying them that right today.

That Muslims have destroyed thousands of temples would not be an issue today if the Muslims had taken the same conciliatory attitude which the Pope takes vis-a-vis the Native Americans (during his 1992 visit to the site where Columbus landed in 1492, the Pope expressed his heartfelt regrets for the suffering which Christendom inflicted on them), which the Japanese now take vis-a-vis the Koreans, the Germans vis-a-vis the

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[2] Muslim popular literature proudly renarrates the old cock-and-bull stories about the Islamic conquerors riding roughshod over the accursed heathens, without any sense of guilt. It is mostly only in a context of collaboration with Hindu-born secularists that Muslims deny the anti-Hindu motivation of their heroes' feats, e.g. in the blatantly unhistorical TV serial *Tipu Sultan*.

Jews, etc. The problem is not what Muslims did in the past, but what they do today: Hindus are trying to exercise a right which religious communities obviously have, viz. to worship at their own sacred site, and Muslims are trying to deny them this self-evident right — *not in the Middle Ages, but today.*

The fact that a community considers a site sacred in the present is sufficient reason for respecting it as such, regardless of history. The Israeli government is protecting Christian access to the places where Christians claim that Jesus was born, crucified and buried. This correct policy is not altered just because modern research has shown these claims to be unfounded.[3] Two of these sites originally had Pagan temples on them, which the Church destroyed. The Church's claim on the supposed site of Jesus' crucifixion was based on a *dream* in which Jesus Himself revealed the location to the Emperor Constantine's Christian mother. One can imagine the scornful secularist reaction if the Vishva Hindu Parishad had based its Ayodhya claims on a dream; yet, the numerous Christians in India's secularist coalition have not made any plans to relinquish the Church's fraudulent or at best dream-based claims on the pilgrimage sites in Palestine.

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Similarly, the Islamic claims on the Kaaba in Mecca and on the Temple Mount in Jerusalem are completely unhistorical and are based on transparent *ad hoc* myths. In this case, we know the circumstances of the myths' deliberate creation with even more exactitude, from the Islamic sources themselves. Mohammed abandoned his fad of imitating Jewish tradition, including the choice of Jerusalem as the direction of prayer, when the Jews proved unimpressed with his claims to prophethood. Therefore he stole Abraham, the presumed founder of the monotheistic tradition which he had adopted, from the Jews, and declared that the Arabs were Abraham's true heirs through Ishmael. The logic of this mythical construction forced him to claim that the Arab national sanctuary at Mecca had been built by Abraham. The fact

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[3] That the claims to these sites were deliberately made up on non-historical grounds by the triumphant Church in the 4th century, is the thoroughly researched thesis of the New Zealand historian Joan Taylor in her book *Christians and the Holy Places*, Oxford University Press 1993.

that it had been in use as a temple of Hubal and other Arab gods and goddesses since time immemorial, was explained away by the (again, totally unhistorical) speculation that the idolaters had at one time usurped the temple which originally belonged to Abraham and his religion.

3rd ✓ In reality, no pre-Islamic Arab text or inscription mentions Abraham, his religion, or his son Ishmael. Conversely, the Bible, the only authentic source on Abraham, never makes him go anywhere near Mecca, nor does it make him build the Kaaba. These two inconvenient facts are explained away by means of a conspiracy theory: the Jews censored their own Scripture and destroyed the existing references to the future prophet Mohammed, and the Pagan Arabs must have done likewise with their inscriptions and oral tradition. The truth of the matter is that Mohammed stole the Kaaba from its rightful owners, who had never practised any Abrahamic or Islamic worship there. Yet, ✓ because the Islamic use of the Kaaba is now a long-standing ritual convention, it is respected as such without any question.

2nd ✓ The Islamic claim to the Temple Mount in Jerusalem is even more transparently fraudulent. Mohammed is supposed to have used it as a landing platform on his night journey through heaven on a winged horse. Any secularist willing to uphold this claim as historical? Or otherwise ready to show the courage of his conviction and demand that the Muslims relinquish their claim to the Temple Mount so as to be morally in a position to demand a similar abandonment of "mythical" claims from the Hindus? Most Jews believe that it is up to the Messiah to rebuild King Solomon's temple on its original site, so they are in no hurry to make the Muslims hand it back. That saves the Israeli government a dilemma: for apart from respecting Jewish sensibilities, it is also committed to the principle that sacred sites, including Islamic ones, are to be respected irrespective of the validity of the claims underlying that status of sacredness.[4]

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[4] This peculiar Messiah-centred Jewish attitude to the Temple Mount is only one of the fundamental differences between the Jerusalem and the Ayodhya situation; it is only a symptom of laziness if not worse to describe the Jerusalem controversy as a "Jewish Ayodhya".

No secularist is brandishing the mythical nature of these Islamic claims in support of a demand to hand the Temple Mount back to the Jews, nor to seize it and declare it a secular "national monument". In the case of Christians and Muslims, no one demands that they prove the historicity of the stories underlying the sacred status of their places of pilgrimage. Demanding the same of Hindus is an insulting display of double standards, a candid statement that one intends to treat Hindus as dirt.

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A matter of faith?

The terms of the Ayodhya debate have often been blurred, sometimes deliberately and mischievously, sometimes out of intellectual incompetence. Both types converge in the affirmation that the Hindu claim to Ayodhya is a matter of "faith".

Some RSS leaders have repeatedly claimed that the Rama Janmabhoomi site should be left to the Hindus out of respect for the "faith" of the Hindu masses in the tradition that Rama was born at that very site. Even the noted historian Prof. K.S. Lal has gleefully been quoted by JNU historian Prof. K.N. Panikkar as declaring: "In religion, it is a matter of faith and not of proof... So by faith alone Christians embrace Jesus Christ to be the Son of God, by faith and faith alone Muslims believe Muhammad to be the Prophet of Allah, and by faith and faith alone Hindus believe Rama janmabhumi in Ayodhya to be the birthplace of Lord Rama."[5] This presentation of the Hindu claim to Ayodhya as being a matter of "faith" is inaccurate and unnecessarily weakens the Hindu position.

For one thing, the status of the enumerated items of faith is different. Christianity stands or falls with the belief that Jesus was God's Only-Begotten Son. Islam stands or falls with the belief that Mohammed is Allah's Prophet. But Hinduism (and within Hinduism even the particular tradition of Rama worship) does not in any way depend on the belief that Rama was born at that or another site, just like Christianity and Islam are not really dependent on their respective claims to specific pilgrimage sites.

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[5] Quoted in K.N. Panikkar: "A Historical Overview", in S. Gopal ed.: *Anatomy of a Confrontation*, p.37 of the Penguin reprint 1993, from K.S. Lal: "Ramjanmabhumi — Some Issues", in *Organiser*, October 1989. Remark that all the historical arguments developed by Prof. Lal, like all those of other competent scholars, have been carefully kept out of view in S. Gopal's book (which for most foreigners is the *only* source about the Ayodhya affair), while this one clumsy phrase has been seized upon to demonstrate the "unhistorical" and "irrational" basis of the Hindu position.

However, it just so happens that the Mohammed whom we talk about when formulating the dogmas of Islam, according to those very texts in which his career is described and given a Prophetic interpretation, was a man from Mecca in Arabia, brought up in the respect for the Pagan Arab sanctuary there, the Kaaba; there is no other Mohammed than the Mohammed from Mecca.[6] Similarly, it so happens that Rama, according to the texts describing his career and glorifying him, was a member of the Aikshvaku dynasty ruling in Ayodhya; there is no other Rama except the Rama from Ayodhya. The agreement among all those concerned that Mohammed was born in Mecca and Rama in Ayodhya may have certain ritual consequences, but is by no means the defining dogma of the respective religions embodied in Mohammed and Rama.

The second fundamental objection to the formulation of the Hindu position regarding Ayodhya in terms of "faith", is that the term "faith" is not respectable among post-Enlightenment intellectuals, much less among Indian secularists. It has a connotation of irrational attachment to unproven and even absurd claims. Thus, "by faith alone Christians embrace Jesus Christ to be the Son of God": that is an accurate description of an irrational behaviour. The notion that a human being, a creature, can be the Creator's only-begotten son, is quite absurd. To believe it, is irrational, is an injustice to man's status as a creature equipped with the faculty of Reason. The defiantly anti-rational position of the Christian faith was summed up by the Church Father Tertullian: *Credo quia absurdum*, "I believe it because it is absurd."

Similarly, "by faith and faith alone Muslims believe

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[6] I cannot mention Jesus at this point, because his birthplace is in doubt: the claim for Bethlehem was made only in an attempt to convince potential Jewish converts that Biblical predictions about the birth of the Messiah in Bethlehem had come true in Jesus.

Muhammad to be the Prophet of Allah": that is an accurate description of a belief without foundation seen for what it was by Mohammed's Pagan contemporaries, who dismissed his "revelations" as hallucinations, fantastic invention or fits of demonic possession. It is simply not true that Mohammed heard the voice of the archangel Gabriel, nor that the text he "received" was a special message from God. Everything in the Quran can perfectly be explained from the psychology and the cultural and social circumstances of the Meccan trader Mohammed.[7] No fact in and about the Quran makes it intellectually necessary for a rational reader to think up the intervention of an outside and superhuman being, be it Gabriel or Allah. It is only by faith that one can accept the irrational claim which is the basic tenet of Islam, viz. that Mohammed received a special message from the Almighty.

By contrast, it is simply not true that "by faith and faith alone Hindus believe Rama janmabhumi in Ayodhya to be the birthplace of Rama". In common with the Muslim reverence for the Kaaba, the Hindu reverence for the Rama Janmabhoomi site is a *ritual convention*, a category which may or may not have a basis in history. In the case of the Kaaba, the convention is demonstrably based on a deliberately concocted myth. The case of Ayodhya is altogether different.

Is it by faith alone that we believe Napoleon lost the battle of Waterloo? Of course, we have no eye-witnesses, and even if we had, we could not be sure that they weren't lying to us. It is, in a sense, an act of faith (underlying *all* reliance on man-made historical evidence) to assume that the wealth of documentary material mentioning Napoleon and directly or indirectly confirming the traditional belief that he was defeated at Waterloo, is trustworthy. However, the scholarly discipline of historical method has developed ways of discerning trustworthy from untrustworthy sources, so that it can raise the mere possibility that the traditional claims of Napoleon's defeat at Waterloo are true, to a degree of probability bordering on certainty. This is not the absolute certainty of faith, but a rational form of knowledge which always remains open to correction, and which is merely the best and most practical instrument with which we can face the historical dimension of reality.

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[7] A brilliant and thoroughly scientific analysis of Mohammed's psychology, strictly based on the authentic Islamic sources, has been developed by the Flemish psychologist Dr. Herman H. Somers in his Dutch-language book *Een Andere Mohammed*, Hadewijch, Antwerp 1992. His conclusions are, of course, not compatible with the fond beliefs of Islam.

We have fewer sources about Rama than about Napoleon, but essentially the situation is the same: while we have no direct evidence in the form of eye-witnesses, we do have documentary sources giving particular information about his career. The tradition that Rama was born in Ayodhya, even on that very site, may well be historical. It is supported by a fairly consistent epic and Puranic tradition, a type of source spurned by 19th-century Orientalists, and still ridiculed by westernized Indian scholars who are not up-to-date with developments abroad, where it has been rehabilitated. The core of the Greek story of Troy, the Biblical histories from Moses down to the Babylonian exile and the Chinese records of the Shang dynasty were once dismissed by scholars as "obviously unhistorical", but are now accepted as remarkably accurate. It is only in India that people are still ignoring their own ancient historical tradition, and keep on treating some haughtily prejudiced 19th-century speculations as Gospel truth.

By Puranic chronology, Rama lived in a pre-Harappan age which has left few durable buildings, so chances are slim that anything about him could ever be archaeologically verified,— or falsified. Unlike the obviously false traditions conferring sanctity on the pilgrimage sites in Mecca, Jerusalem and Bethlehem, the historicity of the Ayodhya tradition remains an undisproven possibility. The geographical prominence of the site, coupled with the consistent epic and Puranic tradition that the Suryavamsha dynasty (including Rama) ruled in Ayodhya, add to the probability of the conventional assumption that that very site once carried Rama's castle.

JNU historian Romila Thapar, a leading militant of the Babri Masjid cause, has claimed in an interview with *Le Monde* that "the real question" is not whether a mosque had forcibly replaced a temple, but whether Rama had lived at that site in the first place.[8] We notice the strategic retreat from a question on which hard proof is readily available (and where she knows her side has lost the battle and will be unable to hold its own in a genuine scholarly debate with international impartisan arbitration) to a question buried in the deep past which is probably beyond verification. As we have already demonstrated, her position that the historicity of the tradition underlying the sacred status of the site is what ought to be proven, is an insulting application of double standards, subjecting Hindus to a test which is out of the question with Islam and Christianity, and which these two religions are totally unable to pass. But for the sake of argument, let us assume that "the real question" concerns Rama's historical birthplace.

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[8] The interview was reproduced in the September 1993 issue of *India*, bimonthly of Shanti Darshan Belgo-Indian Association.

There are two competing answers to that question. One is the traditional answer, based on a corpus of traditional literature. The other is Romila Thapar's not very precise answer, which is essentially ready to let Rama come into this world at any site except at the traditional one. That traditional location may be hard to prove, but there is even less proof for any alternative location. The traditional location has at least documentary evidence in its favour, viz. the tradition itself. Romila Thapar's alternative, by contrast, is only backed by her own eagerness to put Hindus in the wrong. To be sure, it also remains possible that the tradition is somehow mistaken, but the point for an objective scholar is that Romila Thapar has not given one iota of evidence for that scenario. In her overview of the development of different Ramayana versions, she mentions a lot of differences (relationship between Rama and Sita, Janaka and Sita, status of Ravana, of Hanuman) but no two different birthsites.[9]

It was left to the Babri Masjid Action Committee office-bearers to claim,[10] on the basis of a collection of articles by various modern crank writers, that they had "proof" of Rama's birth at no less than seven different places (from Andhra Pradesh and Varanasi via Nepal and Afghanistan all the way to Egypt), apart from having cited "proof" that Rama had never existed at all. To stay within their logic, I suggest that someone who has taken birth at seven different places, was certainly able to take birth at yet one more place, viz. that hilltop in Ayodhya. At any rate, the BMAC's frontal display of contempt for logic and rational method has not pitted any secularist against the BMAC position. For them no allegations of replacing historical knowledge with myth or "faith"; which adds further illustration to our view that the whole rhetoric of *historicity vs. faith* was never anything else than a dispersionary tactic to put the Hindus on the defensive, albeit one in which some Hindu spokesmen were unwitting accomplices by their own mindless adoption of the term "faith".

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[9] "A historical perspective on the story of Rama", in S. Gopal, ed.: *Anatomy of a Confrontation*, p.141-163.

[10] This claim was made in writing during the very first round of the government-sponsored scholars' debate. Out of shame over their abysmally poor performance (which has gone strictly unreported in the media as well as in all academic publications), the BMAC negotiators have never published their argumentation; I could inspect a copy at the Deendayal Research Institute, Delhi. The specific pieces of "proof" are commented on in the VHP rebuttal, see *History vs. Casuistry*, p.38-41.

A Babri Masjid, not a Ram Janmabhoomi problem

Though the Supreme Court judgement was correct in its effective decision, the commentatorial parts of the verdict come in for some serious criticism. This is especially true of its allotment of guilt. The bias showing from these passages should warn against the optimism with which some Hindu commentators have welcomed the verdict.

I suppose I am not the first to notice the glaring contradiction between the following two statements made by the eminent judges in two successive paragraphs. In Para 56, Hindu society is explicitly dissociated from the "guilt" of the demolition on 6 December 1992: "...The miscreants who demolished the mosque had no religion, caste or creed except the character of a criminal and the mere incident of birth of such a person in any particular community cannot attach the stigma of his crime to the community in which he was born." This clear position is reversed in the very next Paragraph, n° 57: "...However, confining exercise of the right of worship of the Hindu community to its reduced form within the disputed area as on 7th January 1993, lesser than that exercised till the demolition on 6th December 1992, by the freeze enacted in Section 7(2) appears to be reasonable and just in view of the fact that the miscreants who demolished the mosque are suspected to be persons professing to practice the

Hindu religion. The Hindu community must, therefore, bear the cross on its chest, for the misdeed of the miscreants reasonably suspected to belong to their religious fold."

Remark first of all the Christian imagery in the last sentence: "The Hindu community must bear the cross on its chest." This illustrates nicely what we had all suspected for a long time: the English-speaking elite in India has preserved the mind-set of the Christian British colonial rulers. The ruling class has borrowed its religious imagery from Western Christianity, just as it has borrowed its secularism from the anti-religious reaction in the late-Christian West. India is still under *Brown Sahib* colonial domination, and the legal apparatus which denies Hindus the right to their sacred site can, in circumstances critical to the establishment's legitimacy, still be used as an instrument of colonial oppression.

Within this anti-native, anti-Hindu colonial system, it is the latter (n° 57) of the two mutually contradictory statements which represents the true spirit: Hindu society is guilty of trying to manage its own affairs at its own sacred site, so it deserves to be punished with administrative restrictions on its access to the Rama Janmabhoomi, and perhaps with further judicial restrictions later. The judges simply confirm what is explicitly laid down in article 30 of the Constitution: minorities enjoy privileges which Hindus don't enjoy, including the non-interference by the government in the affairs of their places of worship. Hindus have no right to complain when the government takes over Hindu temples, nor when it works hand in glove with Islamic activists trying to take over a Hindu sacred site. They should be satisfied with the status of second-class citizens, to which they have been so well accustomed by centuries of colonial rule, Islamic as well as Christian.

The former of the two statements (n° 56), by contrast, is merely a typical exercise in the mendacious secularspeak of the Nehruvian elite: claiming that the religions are not themselves responsible for communal strife, that it is the handiwork of evil political opportunists and "miscreants". In reality, Islam is directly responsible for the communal conflict as a whole; and a group of Hindus are responsible for the demolition of the Babri

Masjid. It is simply not true that the demolishers of the Babri Masjid "had no religion, caste or creed except the character of a criminal". Though not all Hindus agreed on this type of strategy for achieving the reconstruction of a proper temple at the site, it is undeniable that the demolishers acted out of a commitment to Hindu concerns. They certainly belonged to a Hindu caste (say, Maratha) or a Hindu sect (say, Naga sadhu) and professed the Hindu religion. Of course the "stigma" of their intervention does not attach to the whole of Hindu society, but nevertheless every Hindu is entitled to feel some pride that "our boys" have stood up for Hindu dignity on 6 December 1992.

To be sure, some of the people involved in the demolition have done things which are extremely regrettable, and with which Hindu society need not identify itself. If I am to believe newspaper reports (in reporting on the communal conflict, that is always a big "if"), they have, at their own initiative, murdered some Ayodhya Muslims, including the local leader of the BJP minority (= Muslim) cell. Objectionable as this alleged murder may be, it adds proof to the BJP claim that the lead of Ayodhya activism in early December 1992 had been taken by non-BJP people. The demolition itself was equally the work of non-BJP, non-RSS people: they did what many BJP supporters in their heart of hearts had wanted to do but were too afraid or too politically domesticated to put into practice.

It is sad that such a symbolic event like the demolition of the misplaced Babri mosque architecture had to be performed surreptitiously by an unruly crowd of mostly unemployed youngsters. But then, perhaps it was just their task in these circumstances. Under the secularist regime, Hindu society is an underground society, and sometimes it is inevitable that moral imperatives in the service of Hindu society can only be realised by such surreptitious surprise action. Considering the haughtiness with which the Allahabad High Court had just decided to postpone once more its verdict on the acquisition of some of the Ayodhya land by the UP government (intended as part of a strategy towards a peaceful solution), after a full 42 years of endless litigation, it is not fair to allege that the over-enthusiastic

Rama devotees have shown disrespect towards the judicial process and the democratic order which it is supposed to uphold. Rather, they have shown disrespect towards the misuse of the courts for political games, and they have rightly revolted against the judges' contempt for Hindu society, which seemed evident from their unwillingness to settle the dispute brought before them, concerning no less a site than the Rama Janmabhoomi.

The violence which the Rama devotees committed against local Muslims and misbehaving press people is reprehensible, but secondary in importance.[11] The Anglo-American armies liberating western Europe from Nazi rule in 1944-5 could be faulted for war crimes like the bombing of Dresden, but these pale into insignificance compared to their central achievement. Moreover, the responsibility of the inert judges, double-faced politicians and secular fundamentalists who had driven the devotees to that level of exasperation, should never be overlooked. For the Rama devotees, it was merely a matter of building a new temple; it was not they who made it into an issue upon which the survival of India seemed to depend. Those who have pontificated that the stakes in Ayodhya were high, that secularism was in danger, that the foundations of the Republic were being shaken, etc., should not complain when the contending sides ended up mobilising all their forces, including some less polished elements.

In principle I was and still am in agreement with the BJP position that the just Ayodhya objective should be achieved through strategies respecting the rule of law. But like many BJP leaders after the fact, I have understood that the demolition had become a necessity. After 42 years of disingenuous litigation in the Allahabad High Court, it was clear that the judiciary did not mean business. The same can be said of the political establishment, which was looking for ways to please its favourite vote-bank but lacked the courage to rob Hindu society of its sacred site in a straightforward manner. The demolition has certainly brought the conclusion of this controversy a lot closer, and with that, it has ultimately saved thousands of lives. After all, the Babri Masjid movement was determined to fight the normal procedure of Hindus replacing the misplaced structure with proper temple architecture on their sacred site, and to fight it every step of the way. It was therefore a happy event that on 6 December 1992, that way had suddenly become a number of steps shorter.

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[11] How would you behave when you come face to face with someone who has systematically spread the ugliest slander about you for years on end, and who spits into your face right there? Keep that in mind when judging the bloody nose which a few pressmen got from the Kar Sevaks. That they got away with nothing worse than a literal bloody nose, is a matter of great envy for the dozens of Journalists who got killed by Islamic militants in Algeria.

For those readers who are still in doubt, let me repeat that on balance, I approve of the demolition of the Babri structure. In order to make way for proper temple architecture, it had to be demolished anyway, just like the Aurangzebi mosque imposed on the Somnath site was demolished to make way for a new Somnath temple in 1948. The surreptitious manner in which it was done, was certainly not ideal: a negotiated schedule for the demolition of the Babri structure and its replacement with a *shāstrika* temple building would have been preferable, and would have saved us the Islamic riots which erupted everywhere after "Black Sunday"; but such a schedule had turned out to be politically unachievable. The realisation through direct action of a morally desirable goal not yet approved by the authorities should by all means remain an exceptional course of action; and fortunately, nobody in the Hindu movement is advocating a generalised resorting to the 6 December tactic. All in all, it was right to show the world that the transformation of the site through stages of demolition and reconstruction is a purely internal affair of Hindu society. At its own sacred site, it does not need the permission from Muslims and secularists.

There was never a Rama Janmabhoomi problem, only a Babri Masjid problem. That Hindus want to build a temple at their own sacred site, is the most normal and natural thing in the world. By contrast, it is a most astonishing and disgusting circumstance that some Muslims lay claim to this Hindu sacred site and try to occupy it. But the most abnormal and unnatural thing is not this arrogant and self-righteous Muslim behaviour (that much is only the effect of indoctrination in Islamic theology), but the complete support which this Islamic communal aggression has received from world opinion.

That the international media without exception have chosen the side of the Muslim aggressor and condemned the Hindus who were merely minding their own business at their own sacred site, is the eighth wonder of the world. But, as we shall see in the final section, it becomes perfectly understandable when we realise that they merely act upon the "information" given them by the Indian secularists. First we give the solution to the Ayodhya problem.

Historical evidence and the solution

Neither the real probability that Rama was effectively born right there, nor the solid evidence that a temple was destroyed to make way for a mosque, are what should decide this controversy.

After all, the call for historical proof was only launched by secularists spoiling for a fight, as a dispersionary tactic. To be sure, I don't want to follow the Babri Masjid Action Committee historians in replacing factual argument with rhetoric consisting of the attributing of ulterior motives to opponents. The weakness of their argumentative position has to be demonstrated in its own right, as has already been done.[12] They themselves have not contributed any evidence to the search for the historical true story, they were actually demanding from the Hindu side what they themselves never provided, — indeed, never intended to provide. In the process, their ulterior motives have come to light in sufficient measure to warrant some comment.

The aim of the pro-Babri Masjid historians was never to settle any historical questions. If it had been, then they would not have opposed the VHP's request to organize systematic excavations at the site; nor would they have concealed the pro-temple evidence in their publications. Their aim was merely to distract public attention from the obvious and extremely simple solution of this controversy. The fact that this solution would be in favour of the Hindu claims, was apparently unbearable to them, because of their seething hatred of their ancestral religion.

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[12] Important contributions to the debate from the Hindu side include the official argumentation by the Vishva Hindu Parishad, published as *History vs. Casuistry* by Voice of India 1991; *The Ayodhya Temple-Mosque Dispute, Focus on Muslim Sources* by Prof. Harsh Narain, Penman Publ., Delhi 1993; and, in a broader perspective, *Hindu Temples, What Happened to Them* (2 vols.), by Sita Ram Goel et al., Voice of India, 1990-1993.

The solution to the Ayodhya tangle lies in the universal ethical principle known as the Golden Rule: do unto others as you would be done to by them. Since Muslims would not like their own sacred sites to be occupied by members of another religion, they should not claim anyone else's sacred site for themselves.

This means in practice that they should give up every attempt to wrest the site from its rightful owner, Hindu society. This means: no street agitation, no political lobbying inside or outside parliament, and no judicial proceedings. The attempt to occupy another religion's sacred site is morally wrong, and it is not made one percent less wrong by circumstances which seem to bring the achievement of the reprehensible goal within reach. It is not made less reprehensible by political equations which have allowed Islamic activists to score some points (e.g. the Places of Worship Act which freezes the status of places of worship as on 15 August 1947). Nor by the media bias which confers guilt on the Hindus for the riots which Muslims have started in pursuance of their political goals (such as the Muslim attacks on Hindu lives and property all over India, Bangladesh, Pakistan and Great Britain after 6 December 1992), and which thereby gives Muslim rioters ample reward for their aggression.

The incredibly arrogant Muslim attempt to take over a Hindu sacred site is not even justified by the legal sanction to the injustices of history which has been created by the British and Nehruvian juridical status quo-ism regarding the accomplished facts of Islamic iconoclasm, and which may have given the Muslims a judicial leg to stand upon. Pressing the Islamic claim on a Hindu sacred site is morally outrageous, whether in the streets, in parliament or in court; whether using Molotov cocktails, petrodollar bribes, or juridical residues of jihadic accomplished facts. The only just, honorable and workable solution is that Muslims simply withdraw their outrageous claim, preferably with apologies for the damage in lives and political stability which their Babri Masjid agitation has already caused.

Some Muslims have understood the unreasonableness of the Islamic claim to Rama Janmabhoomi. When Chandra Shekhar was Prime Minister, in December 1990, even his friend Syed Shahabuddin wrote that for once, Muslims would be ready to "gift away" the Babri Masjid site: "The law protects the Babri Masjid even if it was constructed on the site of a temple after demolishing it, but in the interest of communal amity, as a one-time exception, the Muslim community is willing to make the offer, as a moral gesture, in accordance with the Shariat."[13] After the demolition, several more Muslim leaders have come forward with proposals to abandon the claim to Ayodhya, notably Maulana Wahiduddin Khan and Asghar Ali Engineer. This raises the issue of a possible settlement with the Muslims, and the terms in which such a settlement should be formulated.

The basis for a settlement must be a correct appreciation of the Ayodhya situation. The site belongs to the Hindus, and the fact of its historical Muslim occupation, now already a distant memory, has not altered that. The ancient Hindu status of the site, strengthened moreover by its restored Hindu status since 1949, implies that Muslims are in no position to "gift away" (1) what isn't theirs in the first place. Muslim postures of "generosity" and "sacrifice for the common good" still carry an implied claim that for now at least, the site is theirs; *it isn't*. Similarly, (2) the assertion that by exercising their rights to their own sacred site, Hindus are "exacting revenge" or "demanding compensation" for Islamic misdeeds of the past, still implies that the site is now the Muslims' property, and that Hindus want to take it back or receive it back.

"Revenge" would mean that Hindus kill as many Muslims as the number of Hindus killed by Muslims (in absolute figures, or perhaps in relative proportion, taking into account today's higher population levels?), which would require a good number of

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[13] Letter in *Indian Express*, 13 December 1990.

Hiroshima-size nuclear bombs; also, thousands of functioning mosques, including those at the sacred sites of Islam in West Asia, would have to be destroyed. It is no Hindu's case that Muslims should be subjected to this kind of treatment, and Ayodhya simply has nothing to do with it.[14]

"Restoration" is out of the question too: the contemporary Indian Muslims do not have the power to restore the millions of Hindu victims back to life, nor to bring back the millions deported as slaves, nor to resurrect the numerous treasures of civilisation which their ancestors destroyed. They may of course try to win back for Hinduism the lost territories now known as Afghanistan, the Maldives, Pakistan, Bangladesh and parts of Southeast Asia; and they are welcome to form a special regiment and take Pak-Occupied Kashmir back into India, — that would be a very incomplete but nonetheless meritorious "restoration".

"Compensation" is what the Hindu upper castes are asked to do towards the Hindu lower castes, in the form of job reservations. In their supreme arrogance, some Muslim leaders are now demanding that Muslims be included in the category of "backwards" to whom the "forward" castes are expected to give favourable treatment in compensation of past injustices; at the same time, they angrily reject any suggestion that they (like upper-caste Hindus) could be held accountable for the "so-called misdeeds" of their ancestors. If compensation is needed in Hindu-Muslim relations, a start should be made with job reservations for the oppressed and dwindling Hindu minorities in Pakistan and Bangladesh: let the bullies make amends to their victims. In the case of the destroyed temples, compensation would mean that the estimated contemporary value of all the buildings and art treasures victimised by Islamic iconoclasm is paid back to Hindu trusts, in the form of a mega-billion sum of petrodollars earmarked for public works in the sphere of Hindu civilisation. Obviously, such "compensation" is not on the cards. No Hindu organisation connected with the Rama Janmabhoomi controversy has formulated its wishes in those terms.

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[14] This point has been developed in the VHP's official rebuttal to the BMAC's evidence bundle, see *History vs. Casuistry*, p.57. Of course, that document is absent from the bibliographies of practically all secularist publications on Ayodhya, even though it represents the official position of the secularists' own chosen enemy, the position which their publications purport to be rebutting.

Let us not get sidetracked by the numerous semantic manipulations with which the secularists are trying to blur this issue. Muslims are not the objects of "revenge", they are not asked to "compensate" anything, not even to "restore" anything. All they should do, is to abandon their claim to what is not theirs: a Hindu sacred site. To put it even more briefly, all they should do is *nothing*, except to get on with their lives. To Wahiduddin Khan and others who attach strings to their offer of leaving the disputed site to the Hindus, it should be clear that Muslims are not in a position to expect any kind of reward for this long-overdue step. There is, however, one reward which they would certainly be getting: a positive feeling among Hindus, who would be reminded that Muslims are human beings like the rest of us.

Meanwhile, the prospect of Muslims "gifting away" the Rama Janmabhoomi site remains academical. The government could of course have chosen to promote these conciliatory Muslim leaders (who are still militant enough)[15] as acknowledged representatives of their community, but it has preferred to stick to confirmed fanatics like Ali Mian, director of a sanctuary for Pakistani spies, on the assumption that they have more of a following among the mass of Muslim voters. At the time of writing, the focus of the ongoing war of Islam against Hindusthan has shifted to other arenas (Kashmir, reservations for Muslims, Urdu), but there is as yet no reason to believe that the Ayodhya normalisation process will be completed in a peaceful manner anytime soon. Let it be clear that that is not the Hindus' fault: they should not bear any cross on their chests for minding their own business at their own sacred site.

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[15] Wahiduddin Khan is an ideologue of the *Tabligh* movement (propagation of pure Islamic ways and abolition of remnants of Hindu culture among Muslims); A.A. Engineer routinely publishes prefabricated "reports" on communal riots in which the Muslim hand is systematically concealed. Their commitment is to Islam, and their conciliatory stand on Ayodhya is only motivated by the calculation that at this point, Islamic interests are served better with a non-confrontational strategy.

Foreign India-watchers on Ayodhya

Hindus should learn from the major defeat they have suffered during the Ayodhya controversy, viz. on the public relations front. The more books and articles on Ayodhya and on "communalism" I look into, the more I feel confirmed in my assessment that the Hindu presentation of their own case regarding Ayodhya is the single worst public relations job in world history. Here is a society of 700-odd million people unable to get its message across to even a single foreign news agency, newspaper, TV-station or indological study group. Here is the case of an oppressed society pleading its right to its very own sacred sites, and the whole world stands solidly behind the Muslim-cum-secularist aggressors who want to deprive them of that right. More than that, the world is indignated and angry with Hindu society for daring to deny "those poor hapless Muslims" their God-given right to steal other communities' sacred sites. It is unbelievable, and future historians will wonder how it could ever come to pass; but with two or three individual exceptions, it is exactly what has happened at least during the five years following the 1989 appearance of the name Ayodhya in the international media.

In a few cases, it is not gullibility that prevents Western India-watchers from conveying the Hindus' case. Former *Time* correspondent Edward Desmond, writer of lengthy pieces on Kashmir in which the 1990 ethnic cleansing of the Hindus goes unmentioned, has deliberately denied the existence of evidence put at his disposal by Voice of India: in his lengthy article on the affair in the *New York Review*, he curtly dismisses all the pro-temple evidence as "bogus", a position he would never be able to hold in a public debate. His strength is, of course, that he does not have to fear any public debate: the other side simply cannot get its message across through the media, so the public assumes that this is a subject on which the debate is closed.

Many Western India-watchers have swallowed the secularist version for so long, that they have interiorised a passionate hatred of the Hindus. For them, even objective information will no longer change their minds: like their Indian counterparts who dispose of the raw information, they distort it until it fits their preconceived picture of ugly Hindus threatening hapless Muslims. It also takes a bit of independent thinking to conceive of a situation where the majority is not the bully; by a mere inertial application of the usually applicable scheme to the particular case of India, one would assume that, like in Pakistan, the minority is *ipso facto* the helpless victim of persecution by the majority.

Usually it is well-meaning scholars who convey only the secularist version because they sincerely don't know of any other. Consider for instance one of the least biased publications on India's communal situation: the French sociologist Gérard Heuzé's book *Où va l'Inde moderne?* ("Whither Modern India?").[16]

For ready-made proof of his independent and open mind, let us mention that Heuzé dismisses charges against the Hindu movement being "fascist", and sees a far greater danger to democracy in the self-righteous and paternalistic mentality of the present colonial elite, particularly from "the increasingly numerous elements in the dominant classes who think of saving the state by installing dictatorship... One feels among opinion leaders and politicians a shift which is emphasized whenever the press highlights riots and bomb attacks. The Communists... reject 'Congress dictatorship' but would welcome a strong state which crushes the communalists, esp. the Hindu ones."[17] Their antidemocratic musings are audible in the discourse of secularism on occasions of religious mob violence, esp. "when several thousands of karsevaks brutally demolished the Babri Masjid, refusing to listen to RSS cadres, who were acting as the last ramparts of the paternalist perspectives. Numerous comments showed clearly that for the academic and establishment commentators, the most insupportable thing was that uneducated youngsters, without any letters of introduction or written authorisations, had intervened to change the course of things."[18]

His arguments against the descriptions of the RSS as a type of "fascism" (he would rather describe it as "Third world identitarian mass movement") are not exactly flattering for the RSS. The Indian establishment insists that the RSS is "the world's largest private militia", but Heuzé stays closer to the facts when he points out that "the way in which the RSS was overwhelmed by a thousand determined youngsters on 6 December 1992 is telling. The sect is worthless in street combat... Its manifestations remind us more of the boyscouts than of mass politics."[19] Both the RSS boast and the secularist bogey story claim that the RSS is a formidable force, but Heuzé laughs at both: so here's an India-watcher I like.

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[16] Gérard Heuzé: *Où va l'Inde moderne?*, L'Harmattan, Paris 1993.

[17] *Op.cit.*, p.65.

[18] *Op.cit.*, p.59.

And yet, watch how even a lucid observer like Heuzé gets trapped. For all his independence, even he proves to be the prisoner of the secularists' control of the information flow. Mentioning the historical claims regarding Ayodhya, he declares that Hindus believe only "since the 19th century" in the forcible replacement of a Rama temple by the Babri Masjid, that "there seems never to have been a temple underneath the mosque", and that the Hindu pillars used in the mosque "were clearly brought from elsewhere".[20] These claims are not true, and have not emerged from the debate as even plausible.

There is no firm information about the pillars' provenance, though the rule is that a mosque systematically incorporated rubble from the very temple which it was replacing. There is ample archaeological evidence that the whole Ramkot hill was covered with a temple complex, as is only to be expected at the geographical place of honour in a temple city. There are three firm pieces of evidence from the 18th century, apart from the unnamed pre-19th century sources cited as such by the local 19th-century Muslim authors.[21] Moreover, Heuzé should have been able to draw the right conclusions from the general context of Islamic iconoclasm, from the fact that the VHP scholars had discovered no less than four attempts by BMAC people to tamper with the evidence, and from the media-centred and swearword-oriented performance of the pro-Babri academics as opposed to the evidence-centred performance of their rather fewer academic opponents.

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[19] *Op.cit.*, p.122

[20] *Op.cit.*, p.7-8.

[21] We refer to Harsh Narain: *Ayodhya Temple-Mosque Dispute*, esp. p.18 and p.91 for the Jaipur maharaja's Janmasthan map (1717), p.10-11 for Tieffenthaler's testimony (1767), p.23-26 for the Persian *"Bahadurshahi Book of Forty Sermons"* (around 1710).

The point is that, judging from his text and bibliography, Heuzé does not know the official VHP argumentation presented during the government-sponsored debate, nor has he heard of the independent studies supporting the temple thesis. The same ignorance about the solid Hindu argumentation is in evidence in the recentmost publications on India's religious conflicts by Peter van der Veer (Holland), Christophe Jaffrelot (France), Susan Bayly (US) and others.[22] They have relied on Indian "secularist" accounts of the *status quaestionis* of Ayodhya research, which have quite purposely kept the more serious and convincing formulations of the Hindu position out of the reader's view.

Thus, Asghar Ali Engineer writes on the cover of his *Babri Masjid Ram Janmabhoomi Controversy*[23]: "Future generations will have a right to know what the controversy was about", but then takes care to include only a few token statements for the Hindu side which are either on peripheral aspects of the debate or belong to the clumsier variety of Hindutva polemic; he repeats the same exercise in his sequel *Politics of Confrontation*.[24] To comment on such manipulation, I need only repeat Engineer's own words on the same cover: "It is not only violence which has to be condemned but also distortion of history and intellectual dishonesty." Similarly, the Penguin book *Anatomy of a Confrontation* edited by S. Gopal, for most foreign India-watchers the *only* available Ayodhya book, carefully keeps Hindu contributions to the debate out of the picture. They have done a magnificent concealment job with the historical evidence presented by their opponents.

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[22] Peter Van der Veer: *Religious Nationalism: Hindus and Muslims in India*, University of California Press, Berkeley 1994; Christophe Jaffrelot: *Les Nationalistes Hindous*, Fondation Nationale des Sciences Politiques, Paris 1993; Susan Bayly: "History and the Fundamentalists: India after the Ayodhya Crisis", *Bulletin of the Academy of Arts and Sciences*, April 1993.

[23] Published by Ajanta Publ. 1990.

[24] Published by Ajanta Publ. 1992.

In the footsteps of these Indian scholars, their Western colleagues writing on Ayodhya pretend to discuss a conflict but do not care to find out the position of one of the parties. Somehow they manage to collect a lot of data and write lengthy papers without noticing that one half of the controversy's contents is missing, and that they are merely rewording the position of one of the two warring parties; though I am sure that they would never accept a student's thesis on any given controversy which reported only one side's version. Future books on the affair will certainly include a chapter on "the Ayodhya scandal": the unscrupled use of academic and media power positions by the secularists to suppress relevant evidence, and the gullibility of foreign scholars relying on hearsay from Indian colleagues whose *bona fides* is open to question.

Not only the specifics of the Ayodhya affair, but the general facts about India's religious conflict are thoroughly misunderstood. Thus, most of the aforementioned scholars have taken to using the phrase "rejection of the Other" as an explanatory characterisation of Hindu hostility against Islam. They believe this is just another typical case of the contemporary worldwide trend of identitarian politics: part of a strategy to construct a common Hindu national identity through polarisation with a hostile outsider. But that is a case of forcing the unwilling facts into a preconceived pet theory.

That Hindu pluralism does not reject "Otherness" has amply been proven throughout Hindu history. The Jews and the Zoroastrians have been (and still are) welcome to their "Otherness" ever since they were allowed to settle in India. Christianity is a more complicated matter, which will perfectly illustrate the various aspects of the issue at hand. On the one hand, the Christianity of the Syrian refugees who settled in Kerala in the 4th century was distinguished from Hinduism by its ritual and doctrinal "Otherness", and suffered no hostility in consequence. On the other hand, missionary Christianity brought by the colonisers is strongly disliked by Hindu activists, not because of its "Otherness", but because of its declared objective to destroy Hinduism, i.e. because of its *hostility to Hinduism's "Otherness"*. This then is also the reason for Hindu hostility to Islam: Hindus perceive Islam as anti-pluralistic and intolerant of what is from the Islamic viewpoint the "Otherness" of Hinduism.

The RSS was not founded as a vehicle of some deep "identitarian" strategy, but as a simple vigilante group protecting Nagpur Hindus against Muslim rioters in the post-Khilafat tension. Hindus who supported the fledgling RSS did not desire to "construct" some ambitious pan-Hindu "identity", they simply desired to be left to live in peace. The Hindu Mahasabha was not formed to pursue some ethereal "identitarian" concerns, but to defend Hindu interests against the increasing influence of the Muslim League. Voice of India was not founded for any of those academically invented "identitarian" reasons, but to combat the systematic disinformation spread by the secularist establishment through all educational and media channels. Whatever problems Hindus may have, it is not with their identity; on the contrary, identity politics is typical of the anti-Hindu forces, esp. the Khalistanis, the Naga Christians, and of course Islam. Western scholars should stop imposing their little pet theories on the facts of Indian politics, a serious business in which Hindu society has to contend with very down-to-earth problems and with some very real enemies.

There are several reasons why Westerners are so receptive to secularist lies about the religious conflict. One is sympathy with the liar, because a lot of lies are being written with the best of intentions. Muslim reformists like A.A. Engineer put up a most reprehensible whitewash of Islamic history and theology; yet one can appreciate that their mendacious claims about Islam being egalitarian, tolerant and pro-woman are aimed in practice at fostering equality, tolerance and a degree of women's emancipation within existing Muslim communities. So, if you meet this progressive Muslim, you risk believing what he says about the intrinsic tolerance of Islam or about the evil RSS pre-planning which, according to him, is invariably the cause of every riot.

Several more reasons may be mentioned, like the Western guilt-trip vis-a-vis the ex-colonised Muslims, but the overriding reason today is certainly the desire, more intense with every passing day, to be reassured that Islam is not as threatening as it seems. Let us look into one example.

A cover story on Islam in *Time Magazine*[25] praises Islam as "among the most egalitarian of religions" which always appealed to "people who felt victimized and deprived of worth in God's eyes under the social hierarchies sanctified by some other faiths". This unmistakable allusion to the Hindu caste system refers to the modern myth that conversions of Hindus to Islam took place because of Islam's message of equality. Since this is not usually said about Christian and Jewish converts to Islam, the line quoted was clearly whispered into the *Time* correspondents' ears by someone fighting for Islam on the Indian front. And yes, his identity is revealed in another passage: "The West's 'next confrontation is definitely going to come from the Muslim world', predicts M.J. Akbar, an Indian Muslim author and adviser to his country's Human Resources Minister. 'It is in the sweep of the Islamic nations from the Maghreb to Pakistan that the struggle of a new world order will begin.'"

Thanks, Mr. Akbar, for that authoritative refutation of the make-believe which the whole *Time* article intended to propagate. M.J. Akbar's opinion should be hard to ignore because he is neither a militant opponent of Islam nor does he seem to be (at least to the untrained eye of the Western observer) a Muslim fanatic. His views on the Hindu-Muslim conflict are usually quoted and reproduced as Gospel truth, but in this case, it is commented away and replaced with its opposite. Numerous Muslim scholars are quoted reassuring the readers that Islam is alright; of course, no voice from any of the numerous victims of Islam is relayed. Fortunately, the article unwittingly contains a glaring illustration of the extent to which Islamic scholars can befool the Western media: "Imtiaz Ahmed, an Indian Muslim scholar at New Delhi's Jawaharlal Nehru University, attributes the more literalistic, even punitive and belligerent readings of the faith today to Islam's sense of being surrounded by threats. He says, 'There are two views of Islamic law. They correspond to the two portions of the Koran revealed in Mecca and Medina.' In Mecca, where the Prophet's religion was fighting for survival, the precepts were 'more militant', he says, while in Medina, where Islam ruled, the messages became more tolerant of minority views and other faiths."

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[25] "Islam: Should the World Be Afraid?", *Time*, 15 June 1992.

In Mecca, Mohammed was first busy formulating his ideas about arcane topics like Allah; next he was hoping to convert people easily; when his claims proved less convincing and his religion less attractive than he thought, he started challenging the pluralistic Pagan society in a violent but nonetheless guarded manner, because he was in a weak position. In Medina, by contrast, Islam had come into its own with Mohammed's successful climb to power, and the Prophet organised open warfare to destroy Paganism (as well as Judaism) root and branch, regularly encouraged and guided by so-called revelations from Allah. The claim that there is more tolerance and pluralism in the parts of the Quran revealed in Medina than in the parts revealed in Mecca, is the diametrical opposite of the truth. Before a JNU scholar like Imtiaz Ahmed, it would be insulting to dismiss this untrue statement as the result of incompetence; in deference to his status, it is therefore more proper to say that his story is a lie. For the information of Western journalists, I may add that it is also a very condescending kind of lie: Prof. Ahmed must have considered the *Time* correspondent very stupid indeed to feed him such an obvious lie which could be found out by even a cursory reading of any annotated Quran translation.

Leading Muslim intellectuals familiar with the ways and the intellectual culture of the West have no qualms about telling lies with a straight face in order to befool non-Muslims in the West as well as in India. This is only one half of the picture, the indispensable other half being the eager gullibility with which the Hindu and Western chattering classes swallow those lies. For a final illustration of this unbelievable gullibility, let us mention the reputation which Syed Shahabuddin has acquired worldwide.

Shahabuddin took a leadership role in all the recent issues of Islamicist mobilisation, including the Shah Bano divorcee alimony rights case, the Babri Masjid movement and the *Satanic Verses* affair. Yet, a fine scholar like Gérard Heuzé calls him a "liberal".[26] If Shahabuddin is a liberal, how should we imagine Heuzé's concept of an extremist? The fact that Shahabuddin brandishes the term "secularism" on every page of his anti-Hindu monthly *Muslim India* should alert readers to the shocking truth, viz. that in India, "secularism" means "hatred of Hinduism" as well as "Islamic imperialism"; instead, unattentive readers conclude that this Shahabuddin must be an enthusiastic *secularist.*

This is a fairly common mistake. If an India-watcher called Bal Thackeray a secularist, he would be in trouble; but the same honour is routinely accorded to Shahabuddin, who is, after all, in the same camp with well-known secularists from JNU. The Dutch scholar Paul Teunissen, in a review of my own book *Ram Janmabhoomi vs. Babri Masjid*, takes me to task for putting Islamic fanatics and secularists in the same bag; he declares that Syed Shahabuddin cannot possibly be a fanatic, considering that "he has promised to demolish the Babri Masjid with his own hands if proof is furnished that it was built on a temple"![27] But it gets even worse.

A leading American Islam-watcher, John Esposito, has edited a strictly academic book titled *Islam in Asia: Religion, Politics and Society*. The part on Indian Muslims and their struggle with those ugly Hindus is written by an American together with, yes, Syed Shahabuddin.[28] While Hindu activists are always treated like animals in a zoo, never allowed to speak for themselves, always condemned to be judged by what someone else has written on the signboard in front of their cage, Muslim fanatics are invited to serve as zoo guides, competent to inform the ignorant outsider about the meanness of these beasts safely locked up in their cages. Small wonder that Esposito is in the forefront of the campaign to reassure Westerners that there is nothing like an Islamic threat, and that, on the contrary, from Delhi to New York, Muslims are the poor and pitiable of this world.

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[26] *Op.cit.*, p.8.

[27] In the Dutch bimonthly *India Nu*, January 1993. Note that he accepts my argumentation that the temple existed, so that "Shahabuddin will have to get serious about his demolition promise".

[28] John Esposito, ed.: *Islam in Asia*, Oxford University Press 1987; Syed Shahabuddin and Theodore Paul Wright, Jr.: "India: Muslim Minority Politics and Society", p.152-176.

In this context, it is small wonder that the international media have blacked out the Hindu version on Ayodhya and completely identified with the Muslim version. Future scholars of political and communications science will study the reporting on the Ayodhya affair as an absolute classic of brilliantly successful disinformation. The main villain of the affair is the class of English-educated intellectuals of upper-caste Hindu background whose hatred of everything Hindu is much more intense than the comparable anti-Christian fervour of some ex-Christians in Europe. The buffoon of the affair is the Western class of India-watchers, India-fans and India correspondents: they have swallowed the anti-Hindu propaganda hook, line and sinker. It is up to the Hindu movement to get around the media monopoly of the secularists and transmit the true story to the world.

Steps towards Secularism

ARUN SHOURIE

"Our stand has been vindicated", "The faith of the minorities in the Courts will be restored," "Secularism has triumphed" — such were the initial reactions of many Muslim leaders and the secularists to the Supreme Court's verdict on the Ayodhya reference.

The reactions were certainly a puzzle, and I could attribute them only to the following sorts of factors.

The first of course was Senator Aitken's aphorism. He was in his eighties at the time. Asked what should be the American policy in Vietnam — this was in the early 1960's — he said, "Cry: '*Victory*'; and run". The Babri Masjid leaders seemed to be following his counsel thirty years later.

The second reason of course was that these were initial reactions, and that they had been made before the full text of the judgement had been read.

There was also vicarious pleasure in the fact that Kalyan Singh had been held guilty of contempt of court, and would go to jail.

Such considerations could provide no more than ephemeral solace — Kalyan Singh for instance has been in and out of jail and appears none the worse for it. But there were in addition two considerations which will have consequences over a longer run.

One of the best achievements of Mr. Chandrashekhar was that he got the two sides to start meeting and talking about the

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mosque at Ayodhya. Muslim leaders had earlier declared that if it could be shown that there had been a Hindu temple at the site before the mosque was built they would themselves persuade Muslims to shift the mosque. In view of this two things were done: the "core" question was identified — "Was there a Hindu temple or structure at the site before the mosque was built?" And both sides were asked to, and they began, producing evidence to support their view. The Muslim side saw that all the evidence was going the other way. They stopped producing the notes they had agreed to submit, and eventually stopped turning up for the meetings. The relief at the Supreme Court's verdict springs from the same source: had the Court decided to take up the question which had been referred to it — the same "core question" which had been pinpointed after discussions by Chandrashekhar's Government — the Muslim side would have been in the same bind; as the Supreme Court decided that the core question was something else — a question to which we shall soon turn — the relief was natural.

And as the Supreme Court has revived the title suits which had been dragging on in the courts for decades, there must have been the feeling that the devices by which these had been kept from progressing for so long could now be deployed again to drag the matter into the indefinite future. The Court has of course said that this is eminently a question to be settled through negotiations. But the Muslim leaders must feel that all they have to do is to adopt the old "permanently negative stance" in these, and the matter will be back with the courts where the well-practised techniques can be put to work.

While these may be the grounds for relief today, I believe they will both rebound on Muslim leaders, and, unless the ordinary Muslim has by then broken out of the militant intransigence of his leaders, on the ordinary Muslim himself.

For the Court has put a condition which will itself become the occasion for Hindu restiveness and eventually become the focus of Hindu action. The Court has said that until the matter is resolved — through negotiations preferably or through the settlement of the dispute over property — the *status quo* must be maintained. This means two things and, as the majority judgement itself points out repeatedly, both work against the Hindus: the make-shift temple must remain as it is, and the Hindu worshippers shall not have the right which they had — of themselves worshipping the idols. The Court today says that this is a cross the Hindus must bear as the ones who demolished the mosque were Hindus. At the moment the Hindus too feel by and large that enough has been done for the present. But as time passes and the idols are seen to be exposed to heat and storm and rain, and the devotees are unable to have their *darshan* the adrenalin will begin to well up again. And when this state of affairs is seen to be continuing because the Muslim leaders are continuing to stall proceedings in the courts, a new, and much more intransigent movement will arise. The very feature on account of which Muslim leaders feel confident today will turn upon them.

But even before that happens another feature of the judgement, indeed its central feature will begin to prove a millstone.

The millstone

Contrary to what Muslim leaders have been insisting, contrary in particular to what Muslim leaders who say their stand has been vindicated have been proclaiming, the Supreme Court has held that a mosque is just a building, a piece of property. And, the Court has emphasised, as a piece of property it is as subject as any other piece of property to the sovereign power of the State to acquire property and regulate its use for public purposes.

"Every mosque is special, every mosque is sacred and inviolable," "Once a mosque always a mosque," "Even if a mosque is demolished the land on which it stood remains forever with Muslims" — such had been the assertions of the Muslim leaders connected with the Babri Masjid movement. The assertions were in flat contradiction to what has been done to mosques in the Middle East, in Pakistan, in Bangladesh — where mosques have been demolished to widen roads, to accomodate cantonments and housing colonies.

The Supreme Court notes in passing the fact that an ordinary mosque does not have any special status in Islam. Its main ground for rejecting the assertions goes much further. It says that whatever Muslim law might be in Islamic countries, Muslim law *as approved by courts in India* does not accord any status to mosques other than as buildings, as pieces of property. It buttresses its view by citing what the Lahore High Court and the Privy Council held in the case of the Shahidgunj Mosque — a mosque which had been taken over by the Sikhs, and the take over had subsequently been ratified by the Lahore High Court and later still the Privy Council. It nails the point by the even more important consideration — that to accept these claims about the status of a mosque being above the laws which apply to other buildings would be to favour Islam over other religions — something which, it says, the courts cannot countenance in view of our commitment to secularism.

Now, this obvious but important affirmation has two consequences — one special, one general; and both far-reaching.

As far as mosques are concerned, the Court says, they are to be as subject as any other building to the normal, secular laws — about acquisition for public purposes, about adverse possession, about the statute of limitations and the like. Notice what this entails for the proponents of the Babri Masjid.

Their case was that as, in any event, the land and structure had been under their adverse possession from 1528 to 1934 (or 1949), it was theirs forever. But as the principle has been held to apply both ways, and as Hindu prayers had been going on in it since 1949, on the same ground of adverse possession they can be held to have lost it. Similarly, the Supreme Court has specifically held that the Statute of Limitations applies as much to mosques as to other pieces of property. Now, this is the very ground on which Justice Deokinandan Agarwal has been urging that the suits on behalf of the Babri mosque are not maintainable — his contention being that they were filed after the period prescribed by the Statute of Limitations.

The consequences transcend the mere matter of mosques. Muslim leaders have been maintaining that Shariat is not only inviolable and eternal and Allah-given — assertions which can be shown to be baseless from beginning to end — they have been insisting that it is an essential element of, a non-severable element of Islam. Not only that, these controllers have been insisting that the Shariat is what they say it is. This is evident from the way they respond each time reference is made to the way in which, in one Islamic country after another the "Shariat" has been reformed: for instance, triple *talaq*, conditional *talaq* etc. have been outlawed in one Islamic country after another. That has no relevance here, they have insisted; this is not an Islamic country and so the Shariat cannot be touched. On this ground in the last few months there has been a campaign to establish Shariat courts — above and outside the legal system of the country.

Far from endorsing a position such as this, the Supreme Court has rejected even claims made in the name of what Muslim law is in Islamic countries. It has repeatedly emphasised that it shall go only by Muslim law *as approved by Indian courts.* The arbiters thus are the Indian courts, not the *ulema.* The touchstone is not what the *alims* say, not what the practice is in some Islamic country. The touchstone is the extent to which the claim conforms to the principles enshrined in our Constitution, the extent to which it conforms to what has been approved by our courts.

Consider the assertions which are made about Muslim law on marriage and divorce — that it cannot be touched etc. — in the light of this affirmation by the Supreme Court. When it can be shown that this law violates the basic principles of the Constitution — and thus violates basic Articles like 14, 15 and 21, the right to equality, the right to live a dignified life — when it can be shown that it embodies practices derogatory to the dignity of women and thus violates Article 51A, in the light of the Supreme Court's affirmation it is no argument to say that the law on *talaq* cannot be touched as it is a part of Shariat.

The same goes for the orders and observations of the courts. In the light of what the Supreme Court has reiterated — about things having to conform to what has been accepted by Indian courts — contrast the vehement insistence of Muslim leaders that there can be no common civil code with the repeated observations of the Supreme Court itself that it is high time to enact such a code. Where do the assertions stand ?

Indeed, Kalyan Singh's punishment for not obeying the orders of the Supreme Court brings the point home with even greater sharpness. "It is also a matter of regret," the Constitution Bench of the Supreme Court observed in the Shah Bano case, "that Article 44 of the Constitution (the one that directs the State to enact a Common Civil Code) has remained a dead letter.... There is no evidence of any official activity for framing a Common Civil Code for the country..." It went on to urge that steps be taken in this regard. In *Ms Jorden Diengdeh v. S.S. Chopra,* the Supreme Court reemphasised the urgent need to enact such a Code. It set out in detail the inequities which resulted from the existence of different codes. It drew attention to the way the recommendations of the courts in this regard had been ignored by the executive. "We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples like the present have found themselves," it observed, and to lend urgency to the matter it concluded, "We direct that a copy of this order may be forwarded to the Ministry of Law and Justice for such action as they may deem fit to take...." That was *nine* years ago. But how has the Law Ministry looked upon such orders and urgings of the Supreme Court?

With contemptuous, and total disregard.

No contempt of court?

Therefore, not just on the specific question of mosques but on the general question of what Islamic law in India is to be, the new judgement opens up many opportunities for creative jurisprudence.

But the judgement which Muslim leaders are portraying as a victory will prove even more of an inconvenience to them than these points suggest.

Distilling the operational rules

As we saw, in its verdict on the Ayodhya Reference the Supreme Court has held that in the eyes of law a mosque is like any other piece of immovable property, and as such it is subject to all the normal secular laws which apply to other pieces of property. This affirmation has immediate and far-reaching consequences which far transcend mere mosques. As mosques are just pieces of immovable property in the eyes of law, non-mosque properties owned by Wakfs — ordinary buildings given out on rent etc. — are all the more so. It is on the control of these properties that much of the hold of the controllers of Muslim votes and affairs depends. And, as the statements of Muslim members in Parliament themselves testify, the management and plunder of these Wakf properties is among the great scandals of modern India. Now, in terms of the new judgement these properties can claim no higher status under property laws than non-Wakf properties, they can claim no exemption from laws applicable to properties in general on the ground that Wakfs are an essential element of Islam, that creation and management of Wakfs are essential parts of Shariat.

That being so, the new *Wakf Act Amendment Bill* which these contractors wrung out of the Government a year and a half ago immediately becomes open to challenge. It in effect exempts Wakf properties from the operation of tenancy and rent control laws. But properties owned by non-religious trusts, as well as properties owned by trusts of religions other than Islam remain bound by these laws. This clearly is favour being shown to one religion *vis a vis* others — something which the Supreme Court, in this judgement as well as in the earlier judgement on the dismissal of BJP governments, has held to be wholly unconstitutional.

So, the very first proposition affirmed by the Supreme Court has far-reaching consequences. But that is just the beginning. For along with this proposition the Court has reiterated four additional propositions, each more important than the preceding one, which go even further. Each of them strikes at the heart of what the controllers of Muslim votes and the champions of Shariat have been asserting.

1 First, the Court has reemphasised what is clear from Articles 25 and 26 themselves — the Articles which guarantee Freedom

of Religion. The Articles themselves state that this right is subject to public order, morality, health, and the requirements of social welfare and reform. As owning, managing or using property is a secular, economic and financial activity it falls within the first exception mentioned in Article 25 itself — namely, the exception that "Nothing in this Article shall affect the operation of any existing or prevent the State from making any law (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice." Given this, the Court has reemphasised that the right to practise, profess and propagate religion does not necessarily include the right to acquire or own or possess property. And the individual mosque or place of worship being just a piece of property, is subject to all the ordinary, secular laws applicable to other pieces of property.

(II) Second, the Court has emphasised that "this right (to practise, profess and propagate religion) does not extend to the right of worship at any and every place of worship so that any hindrance to worship at a particular place *per se* may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution." This simple affirmation strikes down so much of what was being said in regard to the Babri mosque. And of course it strikes at what the controllers had started doing in Bombay — insisting that they had a right to observe *namaz* not only inside mosques but on public roads, the practice which led the Shiv Sena to begin its *"Maha-Aarties"*.

(III Third, "The protection under Articles 25 and 26 of the Constitution," the Court has specified, "is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion." And, it is evident from the tenor of the Court's judgement, whether a particular practice is an essential and integral part of the practice of that religion shall be decided, not by the controllers of that religion but by the Courts. In *Sardar Syedna Taher Saifuddin Saheb versus Bombay* the Court had in effect left the matter of what is an essential practice of a religion to the controllers of that religion, the Syedna in the case of Bohras for instance. This was a position fraught with the worst consequences as these persons happen in many instances to be the most reactionary elements in the community. Therefore the fact that this distinction — between particular practices and essential practices — has been emphasised anew by the Court, that it has been emphasised by it in the context of a mosque, coupled with the whole tenor of the judgement which brings the determination of what is essential practice squarely to the courts — all this is a great advance over the position which had been taken earlier, an advance which the controllers of Muslim votes will certainly rue. For as it can now no longer be asserted that even praying in a particular mosque is a practice essential and integral to Islam, how can it be maintained that to have four wives and to have the power to throw them out, without any maintenance, by uttering just one word are practices essential and integral to the practice of Islam?

Fourth, throughout the verdict the Court distinguishes between the interests of the country and the people as a whole and those of any part, between the public purpose and the interests or claims of a particular group. And it holds that the public purpose shall prevail. This is what lies at the base of its holding, for instance, that the sovereign power of the State to acquire property cannot be curtailed by assertions that a mosque and the land on which it stands or stood are outside the acquisition powers of the State. This is also what lies at the base of its admonitions about the Kar Sevaks and the demolition; otherwise how would it have condemned the demolition in face of the fact that, while it had been carried out by a few thousands, it had been appropriated by millions of Hindus? The Court's answer would be that the purposes of the whole override the urges of a part, howsoever large that part may be.

Now, it is very good to have that reaffirmed. For instance, the claim to the contrary by controllers of Muslim votes and the champions of Shariat has been quite the root of much of the trouble which has buffetted India in the last 15 years. Their entire politics has been premised on the insistence that the interests of the Muslims are distinct and separate, and that these must prevail as distinct and separate interests — Shah Bano, Rushdie, separate personal codes, on everything this has been their stance.

That claim, coupled with the demonstration that if these separate interests are not allowed to prevail they shall jeopardise the interest of the whole — these have been at the root of the trouble.

Weak executives were intimidated by the thundering and campaigns of the fundamentalists. But they were not the only ones. While it would be obviously wrong to say that the courts were intimidated by the thundering, they certainly were influenced by the prevailing "secular" atmosphere, which in turn had been much influenced by the thundering. Consider the set of judgements on Articles 29 and 39 about "minority institutions". It was held in these that these institutions may have nothing to do with the culture and mores of the "minorities", that they may be for instance ordinary engineering and medical colleges, but that, if those who had set them up happened to be from the "minorities" and claimed that these were "minority institutions", the institutions would have privileges which other institutions did not have. They would, for instance, have the right to equal assistance from the State but the powers of the State to intervene to improve their working would be circumscribed in various ways. It was held in particular that "the national interest" or any interest wider than the supposed interest of that particular minority could not be invoked as a ground for intervention.

The new affirmations by the Supreme Court — the distinction between the interest of the country and that of any part howsoever large, the affirmation that it is the public interest which shall prevail — strike at the bases of such rulings on "minority institutions", to take just one instance, and thus open up avenues for initiating their review.

Alongwith the proposition that, like other buildings, places of worship are pieces of immovable property, these four propositions thus go far. But they are in a sense parts of the central theme of the judgement which goes even further.

Specifying the content

One of the troubles with "communalism" and "secularism" in India is that they have been mere words — indeed, in the case of secularists, a word of abuse: Indian secularism has consisted chiefly in branding other people "communal".

The two new judgements — on the dismissal of the BJP governments and on the Ayodhya Reference — mark a substantial step forward. For the first time the Supreme Court has set out to endow content into these words. It is not that in either judgement the Court has said any thing novel, but that for the first time it has said things which are specific, and which can therefore be made the touchstone for assessing policies and measures.

Winnowing out the repetition in the judgements, the following stand out as the ingredients of secularism:

1. The State has no religion;
2. That does not mean that the State shall be anti-Religion; on the contrary, given the ethos of our people, the attitude of the State towards religions shall not be one of hostility but of "benevolent neutrality"; in particular, it shall not favour one religion *vis a vis* other religions, and it shall not discriminate against one religion *vis a vis* other religions;
3. Similarly, the State shall not discriminate against or for any individual on grounds of religion, race, caste, or language or residence;
4. With respect to a religion, practices associated with that religion are to be distinguished from practices which are essential and integral to the practice of that religion;
5. "Freedom of religion" means that each individual shall be free to practise, profess and propagate those core practices which are essential and integral to his or her religion; the State shall ensure that he is not hindered in doing so;
6. Practices which fall outside those which are essential and integral to a religion as well as all secular activities undertaken by persons or bodies associated with a religion shall be regulated by the State as and when necessary; the State shall not be restrained from regulating them by the plea that it is violating "freedom of religion"; in particular, the Supreme Court approvingly quotes Mr. M.C. Setalvad saying, "It (secularism) should connote the eradication of

all attitudes and practices derived from or connected with religion which impede our development and retard our growth into an integrated nation";

7. In the final analysis the courts shall determine what are and what are not practices essential and integral to the practice of a religion;
8. In doing so they shall be guided not by what is the practice elsewhere but by the Constitution and laws of India and by what has been approved by Indian courts;
9. In the life of the people secularism means not just to tolerate the faith of the other; it means an empathetic regard for, an active understanding of the faith of the other, and a caring coexistence with him.

These are fine steps towards exactly the sort of specific enumeration we have needed. I would have added only three points to the list: that what is "religious" shall be limited to purely self-regarding acts, that acts which impinge on others — from the use of loudspeakers to throwing out wives — shall be subject to regulation by the State; that the individual, and not a group shall be the unit of the policies and acts of the State; and that just as nothing is to be given to a body of one religion which is denied to a body of another religion, nothing shall be given to a religious body which is denied to or not available to a non-religious body. And the list of things that are required to replace pseudo-secularism by genuine secularism would have been complete.

But even as it is, the enumeration in the two judgements is a substantial advance, and it strikes at so much which has been practised in the name of "secularism" in the last 20 years. Separate personal codes, the exemption of some properties from laws on the ground that they are owned by believers of one religion, banks which exclude 80 per cent of Indians on the ground that they belong to one religion — each of them is up for challenge in the light of these principles.

Will the courts, in particular the Supreme Court enforce these criteria? What will induce them, or embolden them to do so?

The Court's innocence

"During the negotiations aimed at finding an amicable solution to the dispute one issue which came to the fore was whether a Hindu temple had existed on the site occupied by the disputed structure and whether it was demolished on Babar's orders for the construction of the *masjid*... It was stated by certain Muslim leaders that if these assertions were proved, the Muslims would voluntarily hand over the disputed shrine to the Hindus" — the lines are from the Government's *White Paper* on the Ayodhya dispute, and they are recalled by the minority judgement of Justices Ahmedi and Bharucha.

It is for this reason that Chandrashekhar's Government had identified the "core question" to be whether a Hindu temple had existed at the site before the mosque was constructed. For the same reason it is this question which the Presidential Reference requested the Supreme Court to examine.

Surely, this was a step in the right direction. To refuse to examine the question on the ground that there is no guarantee that either the Government or the Hindus and Muslims will go by the Court's opinion, to hold that giving an opinion on facts and not having the parties abide by it would bring down the "credibility" of the Court — all this betrays how negative is the self-image which the judges have of themselves and the Court. And there is the basic point. When disputes like the one over the Ramjanmabhoomi arise they ought to be reduced to reason, and evidence, and discourse. And there can be no doubt that, agreement having been arrived at through negotiations as to what the core question was, a finding on the facts about it by the Supreme Court would have had the highest moral weight with all sides. The Narasimha Rao Government was thus completely right in affirming that the finding would go a long way in facilitating the subsequent steps.

The majority judgement however takes a different view. It holds that the core question is something altogether different — that it is the dispute over a piece of property; that this has to be settled in terms of the rule of adverse possession, the Statute of

Limitations etc.; that as the question whether a Hindu temple existed at the site earlier is not central to solving *this* core question, the Reference is unnecessary and superfluous. The judges accordingly decline to answer it.

Now, as I said, this is a great opportunity which the Court has missed — for helping dissolve the dispute through the solvents of reason and evidence. The first apprehension arises from the fact that the evidence already available — with Government, and in the public domain — leaves no doubt that there *was* a temple at the site before the mosque was built. The Court has refused to look at it. Would the Court have refused to look at the evidence if it had suggested the opposite? The second point is that the minority judgement goes even further.

It strikes down the Act by which the land had been acquired and it also declines to take up the Reference on the ground that both are slanted in favour of Hindus, and that as such they violate a basic element of the Constitution — namely, secularism — and are therefore unconstitutional.

Its reasoning is strongly rebutted by the majority judgement. If not since 1934, at least since 1949 the Muslims had not been using the structure, the majority judgement points out. The Hindus had been offering worship at the Ram Chabutra inside the mosque even before 1949, it points out. Since 1949 their idols had been in place, it points out, and *puja* was being done regularly. Since 1986 ordinary devotees too had access to the idols, it points out. After the acquisition and demolition the Hindu devotees do not have access to the idols, only a *pujari* does. Moreover, the land which Government has acquired covers not just the land which has been in dispute but also much more, it points out, and so the Hindus who owned it have been made to suffer the consequences. Not that the judgement finds any fault with any of this. It says the steps are reasonable on the ground that while those who destroyed the mosque "had no caste or religion", that while an entire community cannot be held responsible for the acts of "some miscreants", as they "are suspected to be persons professing to practise the Hindu religion" "the Hindu community must... bear the cross on its chest." Thus, the point of its setting out what the position was on the eve of the takeover of lands by Government is not to that the takeover is unjust, but that it affects the rights of Hindus as much as those of Muslims.

So, there is little merit to the charge of the minority judges. But I am on two other points.

That the charge is still made by them, and in such strong language bodes ill for the future. One of the two judges after all has since become the Chief Justice of the country. The apprehensions which the stance of these two judges must have caused among their colleagues break through in the fact that the majority judges feel compelled to nail the charge again and again, and also in observations such as the following: "To hold this provision as anti-secular and slanted in favour of the Hindu community," the majority judgement writes about Section 7(2) of the Act, "would be to frustrate an attempt to thwart anti-secularism and unwittingly support the forces which are responsible for the events of 6th December 1992." Strong words, as they are used by judges of the Supreme Court, and even more so as they refer directly to colleagues sitting on the same bench.

That is one point — that two judges thought fit to read such things into the acquisition Act and Reference bodes ill for the future. There is another one, and it is best seen by taking the minority judgement at face value.

The sea change

In his initial statement on the destruction of the mosque, the two judges complain, the Prime Minister declared that the demolished mosque would be rebuilt. Then Government began talking of building the temple as well as the mosque. Now all it talks about is building the temple. The Solicitor General, the judges record, was pointedly asked whether, in the event of the Court holding that no Hindu temple stood at the site prior to the mosque being built in 1528, the Government would reconstruct the mosque at that precise point. The reply of the Solicitor General, the judges conclude, "leaves us in no doubt that even in the circumstance that this Court opines that no Hindu temple or

Hindu religious structure existed on the disputed site before the disputed structure was built thereon, there is no certainty that the mosque will be rebuilt."

These successive changes are the judges' complaint. To me the complaint is an announcement: the announcement that Hindu sentiment has grown stronger at each step, that it is now so strong that, even when pointedly asked by the Court, the Government is not able to say what it fears will run counter to that sentiment. And to top it all, at least when viewed through the spectacles the two judges have used, these shifts "slanted in favour of " the Hindus, have now been allowed to pass by the Supreme Court itself. All the more so since, through and through the majority judgement talks in terms of the rights of Hindus as Hindus, of their sentiments in the matter — and the judgement is premised on the fact that these rights and sentiments too have to be respected in our country.

Quite a change, I would say. Towards true secularism.

The difficulties ahead

And yet I find in the majority judgement a fatal innocence, an innocence which leads it to shut its eyes to the real factors which have brought us to the present pass, to the obstacles which lie ahead.

"It was particularly heartening to find," it says, "that the cause of the Muslim community was forcefully advocated essentially by the members of the Bar belonging to other communities," and that the Muslim advocate appearing on behalf of the Sunni Central Wakf Board endorsed their arguments on behalf of the Muslim community. This is taken to be a mark of secularism.

In that case of what is one to take the fact to be a mark that the two judges who wrote as Justices Ahmedi and Bharucha did happened to have been the only two non-Hindu judges on this Bench? What is one to conclude from the fact that, while we find Hindu advocates ever so often arguing the Muslim case, in such matters we never find a Muslim advocate arguing the Hindu case?

The judgement recalls that the favourite *bhajan* of Gandhiji was, *"Ishwar Allah tere naam..."* It recalls that Guru Gobind Singh had written,

Dehura maseet soi, puja o' namaz oyi
Manas sabhai ek pai anek ko prabhav hai
Allah abhekh soi, Puran o'Kuran oyi
E' ek he saroop sabhai, ek hi banav hai

Mandir or mosque, *puja* or *namaz*,
Puran or Quran, they are all the same.
All human beings are the *swaroop*
Of the same One, they are equal and one,
Only their appearances differ..

The judgement quotes and invokes these *bhajans*. But it does not note the fact that there are *fatwas* and *fatwas* which declare that any Muslim who says that Allah is no different from the *Ishwar* of the *mushriqs,* the polytheists, any Muslim who says that the Quran is like the books of other religions or that the latter are holy like the Quran is a *murtad,* an apostate, and which reiterate that the punishment for apostasy is death. The Court can obtain collections which contain such *fatwas* from Jama Masjid today.

The judgement quotes the President, Dr. S.D. Sharma to the effect that "It (the Quran) does not confine Him (Allah) to Muslims alone. The Second Surah in the Quran, titled *'Al-Baqurah'* gives a warning, which is repeated throughout the Quran, that it is not mere professing of one's creed, but righteous conduct, that is true religion..." But it does not note that for all his goodness and exalted office Dr. Sharma hardly counts in these matters. Maulana Azad, on the other hand, did count. And this was the *leitmotif* of the first volume of his *Tarjuman al-Quran.* And what happened when he published it? So fiercely was he attacked that he had to write letters in his own hand "explaining" away and diluting his argument to such an extent that when two years ago the Khuda Baksh Library published an account of the controversy it thought fit to reproduce the facsimiles of the hand-written letters of the Maulana. The editor wrote that he was doing so as readers of the *Tarjuman al-Quran* would find it difficult to believe that the author of that work had later written such things.

The judgement quotes a pamphlet published by the poor

Baha'is but does not note what the controllers of the overwhelming proportion of Muslims in India — the Sunni *ulema* — declare about them, nor does it note that it is only in a country like India, where Islam is not the reigning ideology, that they live in security.

It quotes the proclamations from the Rig, Yajur and Atharva Vedas — about all human beings being one, about their being the children of the same Mother-Earth, about the yearnings that all of us be friends. But it does not note that less than a mile from its building volumes upon volumes of *fatwas* are being sold and distributed which exhort Muslims never to trust *Kafirs,* never to allow them into their confidence; which tell them that their first duty and allegiance is to their religion and not to sundry laws, that their duty is to wish Islamic governments well, to aid them; which declare India to be *Dar al-Harb* — the land of war; volumes in which Muslims are exhorted to wear one kind of dress rather than the other *because* the latter is the attire the *Kafirs* use, publications and *fatwas* in which they are told that slaughtering cows is "a great Islamic act" in India *because* in India the cow is venerated; in which the most lurid picture is painted of *Kafirs*, of Hindus in particular. "Should we accept sweets which the Hindus offer us at Diwali ?," the *ulema* are asked. First of all, the sweets are associated with a religious festival of the polytheists: so taking them is strictly *haram*, they declare. Then, they declare, see what is being given to you: these sweets are made by them in *kadhais* which the dogs lick evening-long, which the Hindus wash with their filthy water in the morning, and which they then wipe with *dhoties* they have been wearing for a year and which at any moment have a *chatank* of urine in them ....

And these are the elevated texts from among the literature on which the faithful are weaned. In addition there is the entire politics which has grown up around separateness.

It is not Gandhiji who needs to be convinced that Ishwar and Allah are one. It is not Guru Gobind Singh who needs to be convinced that *mandir* and *masjid*, Puran and Quran are one. The ones who need to be convinced that they are one — say, the *ulema*, or the Shahi Imam, or Shahabuddin, Owaisi and Suleiman Sait — have it as an article of faith that they are *not* one.

That ideology and that politics are the obstacle to abiding by the norms of secularism which the Supreme Court has spelled out. And the evidence of this judgement suggests that even the Supreme Court has as yet to clear away a lot of mental cobwebs before it will be able to deal with the obstacle.

Till then I am afraid the Indian road to secularism will be the one we have been traversing: in which excesses inflict grave consequences, which at last lead us to acknowledge what was staring us in the face all the time.

Mrs. Gandhi's dithering almost resulted in it being conceded as a constitutional principle that the Golden Temple shall be a State within the State. Bhindranwale's excesses forced Blue Star, and the principle was established that the State shall have search and seizure powers over all places, religious as much as secular. The success of the Muslim leaders in stalling the suits in the courts, in killing the negotiations about the temple has ended in the Supreme Court declaring that a mosque is just another piece of property. The double-dealing of politicians and the double-standards of public discourse inflamed Hindu sentiment — to such an extent that both this "secular" Government and the Supreme Court itself have had to take note of it. That shall the route to secularism, it seems.

Begging Faiz's pardon,

sitam hi sikhlayega rasme wafa...
sanam hi dikhlayenge rahe khuda...

ANNEXURE

A.I.R 1940 PRIVY COUNCIL 116

[*FROM LAHORE: A.I.R 1938 LAH 369 (FB)*]

2ND MAY 1940

LORD THANKERTON, LORD RUSSELL
OF KILLOWEN, SIR GEORGE RANKIN,
LORD JUSTICE GODDARD
AND MR. JAYAKAR

*Mosque known as Masjid Shahid Ganj
and others* — Appellants.
v.
*Shiromani Gurdwara Parbandhak Committee, Amritsar
and another* — Respondents.

PRIVY COUNCIL APPEAL No.91 of 1938.

(a) **Mahomedan Law — Court should not ascertain law by taking evidence of expert witnesses.**

It is the duty of the Courts themselves to interpret the law of the land and to apply it and not to depend on the opinion of witnesses however learned they may be. It would be dangerous to delegate their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which Courts in British India are not supposed to be conversant. Opinion of experts on foreign law are therefore allowed to be admitted. [P 120 C 1]

Hence, it would not be tolerable that a Hindu or a Muslim in a British Indian Court should be put to the expense of proving by expert witnesses the legal principles applicable to his case and it would introduce great confusion into the practice of the Courts if decisions upon Hindu or Muslim law were to depend on the evidence given in a particular case, the credibility of the expert witnesses and so forth. The Muslim law is not the Common law of India: British India has no Common law in the sense of law applicable prima facie to everyone unless it be in the statutory Code, e.g. Contract Act and Transfer of Property Act. But the Muslim law is under legislative enactments applied by British Indian Court to certain classes of matters and to certain classes of people as part of the law of the land which the Courts administer as being within their own knowledge and competence. The system of "expert adviser" (muftis, maulavis or in the case of Hindu law pandits) had its day but has long been abandoned though the opinions given by such advisers may still be cited from the reports. Custom, in variance of the general law, is matter of evidence but not the law itself: *AIR 1925 All 720, Approved,* [P 120 C]

(b) **Annexation — Punjab annexation — Court cannot uproot titles acquired prior to annexation by applying law which did not then obtain as law of the land.**

There is nothing in the Punjab Laws Act or In any other Act authorizing British Indian Courts to uproot titles acquired prior to the annexation of the Punjab by applying to them a law which did not then obtain as the law of the land. There is every presumption in favour of the proposition that a change of sovereignty would not affect private rights to property: *(1905) 2 KB 391, Rd.* [P 120 C]

(c) **Limitation Act (1908), Art. 144 — Limitation Act applied to wakf property — Property made wakf for purposes of mosque can be adversely possessed.**

The rules of limitation which apply to a suit are the rules in force at the date of institution of the suit, limitation being a matter of procedure. The Limitation Act of 1908 applies to immovables made wakf, notwithstanding that the ownership in such property is said, in accordance with the doctrine of the two disciples, to be in God. It is impossible to read into the modern Limitation Acts any exception for property made wakf for the purposes of a mosque, whether the purpose be merely to provide money for the upkeep and conduct of a mosque or to provide a site and building for the purpose. It cannot be said that such a building cannot be possessed adversely to the wakf, or that it is not so possessed so long as it is referred to as 'mosque', or unless the building is razed to the ground or loses the appearance which reveals its original purpose. [P 121 C1, 2]

(d) **Mahomedan Law — Wakf — Rule that wakf property ceases to be under human ownership applies even if wakf is wakf-alal-aulad — Result of rule stated.**

The rule of Hanafi law that wakf property is taken to have ceased to be held in human ownership is applied to all such property even if the wakf be a wakf-alal-aulad or wakf for the benefit of descendants. The result of the rule is not that the property cannot, in any circumstances, be alienated but that it can only be alienated for proper purposes and save as provided by the terms of the endowment with the leave of the Court. In some circumstances it can even be taken in execution.

[P 121 C 1]

(e) **Practice — Parties — Suit cannot be competently brought by or against mosques as artificial persons.**

In British India the Courts do not follow the Mahomedan law in matters of procedure, any more than they apply the Mahomedan criminal law or the ancient Mahomedan rules of evidence. The question whether a British Indian Court will recognize a mosque as having a *locus standi in judicio* is a question of procedure. Suits cannot competently be brought by or against mosques as artificial persons in the British Indian Courts.

[P 121 C 2; P 122 C 1, 2; P 123 C 1]

(f) **Hindu Law — Religious endowment — Property of religious endowment is subject to law of limitation** *(Obiter).*

The property of a Hindu religious endowment, including a thakurbari, is subject to the law of limitation : *37 Cal 885 (PC), Rel. on.* [P 122 C 1]

(g) **Mahomedan Law — Mosque whether juristic personality** (Quaere).

"Juristic personality" whether it may be extended for any purpose to Muslim institutions generally or to mosque in particular. [P 122 C 2]

(h) **Mahomedan Law — Right of Moslem to use mosque for devotion — Nature explained — Notice of rights of individual**

beneficiaries does not modify effect of possession adverse to wakf.

The right of Muslim worshipper may be regarded as an individual right, but it is not a sort of easement in gross, but an element in the general right of a beneficiary to have the wakf property recovered by its proper custodians and applied to its proper purpose. Such an individual may, if he sues in time, procure the ejectment of a trespasser and the property delivered into the possession of the mutwalli or of some other person for the purposes of the wakf. As a beneficiary of the religious endowment, such a plaintiff can enforce its conditions and obtain the benefits thereunder to which he may be entitled. But if the title conferred by the settlor has come to an end by reason that for the statutory period no one has sued to eject a person possessing adversely to the wakf and every interest thereunder the rights of all beneficiaries have gone: the land cannot be recovered by or for the mutwalli and the terms of the endowment can no longer be enforced. The individual character of the right to go to a mosque for worship, matters nothing when the land is no longer wakf and is no ground for holding that a person born long after the property has become irrecoverable can enforce partly or wholly the ancient dedication : *AIR 1918 Mad 464, Ref.*

[P 123 C 1, 2]

Notice of the rights of individual beneficiaries does not modify the effect under the Limitation Act of possession adverse to the wakf.

[P 123 C 2]

(i) **Res Judicata — Suit by mutwalli for possession of mosque for purposes of wakf dismissed on ground of adverse possession — Demolition of mosque — Subsequent suit for declaration that building is mosque and for mandatory injunction for restoration of building is barred by res judicata.**

A mutwalli filed a suit for possession of mosque for purposes of wakf. The suit was dismissed on ground of adverse possession. The mosque was demolished. A suit was subsequently brought not for recovery of land in dispute but for declaration that the building was mosque and for mandatory injunction for restoration of the building:

Held that the suit was barred under the general principle of res judicata. [P 123 C 2]

(j) **Sikh Gurdwaras Act (8 of 1925), S. 37 — Words "except as provided in this Act" do not refer to S. 30 (ii).**

The words of S. 37 "except as provided in this Act" have no reference to the provisions of cl. (ii) of S. 30 which states the circumstances under which a suit shall be tried notwithstanding that the claim was not put forward before the tribunal.

[P 124 C 1]

(k) **Limitation Act (1908) — Limitation Act applies to Muslim religious institutions.**

By the Punjab Laws Act, 1872, the Mahomedan law is made applicable to the religious institutions of the Muslims but only in so far as it has not been modified by legislation. Thus the Limitation Act, 1908, applies to religious institution of the Muslims though limitation is not an original principle of Mahomedan law.

[P119 C 2]

L.P.E. Pugh and J.M. Pringle —

for Appellants.

H.N. Wallink and W. Wallach —

for Respondents.

Sir George Rankin — Before 1935 there had stood for many years to the south of what is now called the Naulakha Bazaar, in the city of Lahore, a structure having three domes and five arches, which had been built as a mosque (masjid) and which retained, notwithstanding considerable disrepair, sufficient of its original character to suggest, or even to proclaim, its original purpose. It had a projecting niche (mehrab) in the centre of the west wall such as is used in mosques as the place from which the imam leads the prayers. Its dedication is no longer in dispute, having been established as of the year 1134 A.H. or 1722 A.D. by the production and proof of a deed of dedication executed by one Falak Beg Khan. By this deed, Sheikh Din Mohammad and his descendants were appointed mutawallis. The deed speaks of a school, a well and an orchard as being among the appurtenances of the mosque and gives the total area of the dedicated property as three kanals and fifteen marlas; but it is not now necessary to ascertain with precision the limits of the original curtilage.

No less well established than the dedication is the fact that from about 1762 A.D. the building, together with the courtyard, well and adjacent land, has been in the occupation and possession of Sikhs. The occupation of Lahore by the "Bhangi Sardars" in 1762 was the commencement of Sikh power in this part of India. Sikh rule continued under Ranjit Singh, who in 1799, established himself by force of arms as the local ruler. It ended only in 1849, ten years after the death of Ranjit Singh, when the Punjab as a result of the second Sikh war became part of British India by annexation. At some time during the Sikh domination, land adjacent to the mosque building (but to the north of what is now the Naulakha Bazaar) became the site of a Sikh shrine (gurdwara) and the tomb of a Sikh leader named Bhai Taru Singh situated thereon was held in reverence. The land, which in 1722 had been dedicated to the purposes of a mosque, came to be held and occupied by the managers and custodians of the Sikh institution and the mosque building was used by them. Until about 50 years ago, part of the building was used for the worship of the Granth Sahib or holy book of the Sikhs. Other parts have been used for secular purposes being let out to tenants, or used for storing chaff (bhusa) or holding rubbish.

By a tradition which cannot be ignored (though their Lordships are thankful to be free of any duty to investigate its truth) the land adjacent to the building was regarded by the Sikhs as a place of martyrs (shahid ganj), it being commonly held among them that Bhai Taru Singh had on this spot suffered for his religion at the hands of Muslim rulers and that many others including women and children had been executed here. Thus communal feelings have long been in a state of tension as between Muslims and Sikhs with respect to this masjid shahid ganj. Its history after 1760 is summarized in the trial Judge's finding that "this mosque has not been used as a place of worship by Muslims since it came into Sikh possession and control:" in the Chief Justice's statement that "there has been a complete denial to the Muslims of all their rights;" and in the language of Bhide J., that

> it is scarcely likely that the Mahomedans would have been allowed to have access to the building for any purpose whatever during this period (1760 to 1853).

These findings are not in any way blunted by the consideration that a pious mutawalli might properly have let parts of the waqf property to tenants appropriating the rents to the purposes of the waqf. The possession of the Sikhs has been hostile not merely to the claim of other persons to the office of mutawalli of this mosque, but hostile to the waqf itself and all interests thereunder. On the other hand it is true that the building has been frequently and indeed has been generally referred to as a mosque by those who have had its custody as well as by others and that it retained to the end the outward appearance of a mosque.

In 1849, at the time of the British annexation, the mosque building and the property which had been dedicated therewith were in the possession of certain Sikhs, mahants of the gurdwara. It is unnecessary to decide whether they held it under a revenue-free grant made to them by the Sikh authorities as it is certain that they held it and used it for their own purposes and for the purposes of the gurdwara as already described. The facts are made plain by the action taken to recover the property for the purposes of Islam soon after Sikh authority had given place to British. A criminal case brought in 1850 by one Nur Ahmad claiming to be mutawalli and proceedings in the Settlement Department brought by him in 1853, came to nothing as he had been long out of possession. A civil suit with a like object was brought and dismissed in 1853. On 25th June 1854, yet another suit by Nur Ahmad was brought in the Court of the Deputy Commissioner, Lahore, against the Sikhs in possession of the property: it was dismissed by the officer on 14th November 1855, by the Commissioner on 9th April 1856, and on further appeal by the Judicial Commissioner on 17th June 1856.

In 1925 the Sikh Gurdwaras Act (Punjab Act 8 of 1925) was passed for the purpose of ascertaining what Sikh shrines were in existence and what property they owned; and of vesting the management of such shrines in certain committees (and other bodies). This step had become necessary to bring to an end disturbances which had been caused by disagreement between different schools or sects among the Sikhs. On 22nd December 1927, by a Government notification the old mosque building and land adjacent thereto was included as belonging to the Sikh gurdwara "Shahid Ganj Bhai Taru Singh." Seventeen claims were made by various petitioners to have rights therein. One dated 8th March 1928 was by Mahant Harnam Singh and others to the effect that the property belonged to them personally and not to the institution of which they were the head. Another dated 16th March 1928 was by the Anjuman Islamia of the Punjab "on behalf of the Mahomedans" claiming that the land and property were dedicated for a mosque and did not belong to the gurdwara.

Both sets of claimants failed before the Sikh Gurdwaras Tribunal which decided on 20th January 1930, that the mahants' possession had been held on account of the gurdwara and that the Anjuman's case failed by reason of adverse possession and previous decisions. No appeal was brought by the Anjuman from the latter decision but against the former an appeal brought by the mahants was dismissed by the High Court on 19th October 1934. In the result the property and building were given into the custody of the defendants and on the night of 7th July 1935, the building was suddenly demolished by or with the connivance of its Sikh custodians under the influence of communal ill-feeling. Riots and disorder ensued and much resentment was felt and expressed by the Muslims.

The plaint in the present suit was filed on 30th October 1935, in the Court of the District Judge, Lahore, against the Shiromani Gurdwara Parbandhak Committee, and the Committee of Management for the Notified Sikh Gurdwaras at Lahore — the authorities who were in possession of the disputed property as being property belonging to the gurdwara. It contained no claim for possession of the property or ejectment of the defendants or that the property be handed over to the hereditary mutawalli. The relief claimed was a declaration that the building was a mosque in which the plaintiffs and all followers of Islam had a right to worship, an injunction restraining any improper use of the building and any interference with the plaintiffs' right of worship: and a mandatory injunction to reconstruct the building. The learned District Judge dismissed the suit by decree dated 25th May 1936, and an appeal to the High Court was dismissed on 26th January 1938* by Young C. J. and Bhide J.; Din Mohammad J. dissenting.

By the Punjab Laws Act, 1872, the Mahomedan law is made applicable to the religious institutions of the Muslims but only in so far as it has not been modified by legislation. Thus, the Limitation Act, 1908, applies though limitation is not an original principle of Mahomedan law. The length of time which had elapsed since the property claimed had been lost to Muslims and the repeated failure of the attempts previously made to recover it for their use and benefit, were manifest objections to the grant of the relief sought. To assist in surmounting these difficulties, the suit was brought by 18 plaintiffs of which the first was the mosque itself suing by a next friend — not the waqf or institution or charity in some abstract sense but the mosque in the sense of the site and building. The declaration sought was "that plaintiff 1 was and is the site of a waqf mosque," the injunction sought was that the defendants "should not use plaintiff 1 for any purpose which may be contrary to its sanctity" and the mandatory injunction asked for was "to reconstruct that portion of plaintiff 1 — i.e. the mosque which they demolished."

The choice of this curious form of suit was motived apparently by a notion that if the mosque could be made out to be a "juristic person" this would assist to establish that a mosque remains a mosque for ever, that limitation cannot be applied to it, that it is not property but an owner of property. A second feature of the suit as framed is that a number of the plaintiffs were minors or women. This was thought to be of some assistance to the plaintiffs in meeting objections taken under the Sikh Gurdwaras Act, 1925, to the competence of the suit, but it was also relied upon before the Board in argument as relevant to the general question of limitation.

A third feature of the suit has reference to the method of trial, the learned District Judge having been persuaded that the mode by which a British Indian Court ascertains the Mahomedan law is by taking evidence. The authority of Sulaiman J. to the contrary, 47 All 823[1] at p. 835, was cited to him but he wrongly considered that S. 49, Evidence Act, was applicable to the ascertainment of the law. He seems also to have relied on the old practice of obtaining the opinions of pandits on questions of Hindu law and the reference made thereto in 12 MIA 397[2] at pp. 436-9. No great harm, as it happened, was done by the admission of this class of evidence as the witnesses made reference to authoritative texts in a short and sensible manner.

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* [*Reported* in (1938) 25 AIR Lah 369 (FB).]

But it would not be tolerable that a Hindu or a Muslim in a British Indian Court should be put to the expense of proving by expert witnesses the legal principles applicable to his case and it would introduce great confusion into the practice of the Courts if decisions upon Hindu or Muslim law were to depend on the evidence given in a particular case, the credibility of the expert witnesses and so forth. The Muslim law is not the common law of India; British India has no common law in the sense of law applicable prima facie to everyone unless it be in the statutory Codes, e.g. Contract Act, Transfer of Property Act. But the Muslim law is under legislative enactments applied by British Indian Courts to certain classes of matters and to certain classes of people as part of the law of the land which the Courts administer as being within their own knowledge and competence. The system of "expert advisers" (muftis, maulavis or in the case of Hindu law pandits) had its day but has long been abandoned, though the opinions given by such advisers may still be cited from the reports. Custom, in variance of the general law, is matter of evidence but not the law itself. Their Lordships desire to adopt the observations of Sulaiman J. in the case referred to:

> It is the duty of the Courts themselves to interpret the law of the land and to apply it and not to depend on the opinion of witnesses however learned they may be. It would be dangerous to delegate their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which Courts in British India are not supposed to be conversant. Opinions of experts on foreign law are therefore allowed to be admitted.

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[1] Aziz Banu v. Muhammad Ibrahim Husain, (1925) 12 A I R All 720=89 IC 690=47 All 823=23 A L J 768.

[2] Collector of Madura v. Moottoo Ramalinga Sathupathy, (1868)12 M I A 397=1Beng L R 1=2 Suther 135=10 W R 17=2 Sar 361 (P C).

It has been made clear by learned counsel for the appellants that the plaintiffs do not now claim any relief extending beyond the actual site of the mosque building. The first question to be asked with reference to this immovable property is the question: In whom was the title at the date when the sovereignty of this part of India passed to the British in 1849? It may have been open to the British on the ground of conquest or otherwise to annul rights of private property at the time of annexation as indeed they did in Oudh after 1857. But nothing of the sort was done so far as regards the property now in dispute. There is nothing in the Punjab Laws Act or in any other Act authorising the British Indian Courts to uproot titles acquired prior to the annexation by applying to them a law which did not then obtain as the law of the land. There is every presumption in favour of the proposition that a change of sovereignty would not affect private rights to property: *cf.* (1905) 2 K B 391.[3]

Who then immediately prior to the British annexation was the local sovereign of Lahore? What law was applicable in that State to the present case? Who was recognized by the local sovereign or other authority as owner of the property now is dispute? These matters do not appear to their Lordships to have received sufficient attention in the present case. The plaintiffs would seem to have ignored them. It is idle to call upon the Courts to apply Mahomedan law to events taking place between 1762 and 1849 without first establishing that this law was at that time the law of the land recognized and enforced as such. If it be assumed, for example, that the property in dispute was by general law or by special decree or by revenue-free (muaf) grant vested in the Sikh gurdwara according to the law prevailing under the Sikh rulers, the case made by the plaintiffs becomes irrelevant. It is not necessary to say whether it has been shown that Ranjit Singh took great interest in the gurdwara and continued endowments made to it by the Bhangi Sardars as was held by Hilton J. (20th January 1930) presiding over the Sikh Gurdwaras

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[3] West Rand Gold-mining Co. v. The King (1905) 2 K B 391=74 L J K B 753=93 L 207=21 T L R 562.

Tribunal. Nor is it necessary that it should now be decided whether the Sikh mahants held this property for the Sikh Gurdwara under a muafi grant from the Sikh rulers. It was for the plaintiffs to establish the true position as at the date of annexation. Since the Sikh mahants had held possession for a very long time under the Sikh State there is a heavy burden on the plaintiffs to displace the presumption that the mahants' possession was in accordance with the law of the time and place. There is an obvious lack of reality in any statement of the legal position which would arise assuming that from 1760 down to 1935 the ownership of this property was governed by the Mahomedan law as modified by the Limitation Act, 1908.

The rules of limitation which apply to a suit are the rules in force at the date of institution of the suit, limitation being a matter of procedure. It cannot be doubted that the Limitation Act of 1908 applies to immovables made wakf notwithstanding that the ownership in such property is said, in accordance with the doctrine of the two disciples, to be in God. Thus in 50 I A 84,[4] it was expressly stated by Lord Sumner delivering the judgement of the Board :

> The property in respect of which a wakf is created by the settlor is not merely charged with such several trusts as he may declare, while remaining his property and in his hands. It is in very deed 'God's acre' and this is the basis of the settled rule that such property as is held in wakf is inalienable except for the purposes of the wakf.

Yet in that very case it was taken as plain that if Art. 134, Limitation Act, did not apply to a wakf the claim to recover possession of wakf property was governed either by Art. 142 or Art. 144.

The rule of Hanafi law that wakf property is taken to have ceased to be held in human ownership is applied to all such property even if the wakf be a wakf-alal-aulad or wakf for the benefit of descendants. The result of the rule is not that the property cannot in any circumstances be alienated but that it can only be alienated for proper purposes and save as provided by the terms of the endowment with the leave of the Court. In some circumstances it can even be taken in execution. In the particular case of a mosque, like that of a graveyard, the wakf property is intended to be used in specie for a certain purpose — not to be let or cultivated so that the income may be applied to the purposes of the wakf. This and other facts make some case for a contention that such property cannot be alienated on any conditions or with any sanction, though their Lordships are by no means satisfied to affirm so wide a proposition. But the Limitation Act is not dealing with the competence of alienations at Mahomedan law. It provides a rule of procedure whereby British Indian Courts do not enforce rights after a certain time, with the result that certain rights come to an end. It is impossible to read into the modern Limitation Acts any exception for property made wakf for the purposes of a mosque whether the purpose be merely to provide money for the upkeep and conduct of a mosque or to provide a site and building for the purpose. While their Lordships have every sympathy with a religious sentiment which would ascribe sanctity and inviolability to a place of worship, they cannot under the Limitation Act accept the contentions that such a building cannot be possessed adversely to the wakf, or that it is not so possessed so long as it is referred to as "mosque" or unless the building is razed to the ground or loses the appearance which reveals its original purpose.

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[4] Abdur Rahim v. Narayan Das Aurora, (1923) 10 A I R P C 44=71 I C 646=50 I A 84=50 Cal 329 (P C).

The argument that the land and buildings of a mosque are not property at all because they are a "juristic person" involves a number of misconceptions. It is wholly inconsistent with many decisions whereby a worshipper or the mutwalli has been permitted to maintain a suit to recover the land and buildings for the purposes of the wakf by ejectment of a trespasser. Such suits had previously been entertained by Indian Courts in the case of this very building. The learned District Judge in the course of his able and careful judgement noted that the defendants were not pressing any objection to the constitution of the suit on the ground that the mosque could not sue by a next friend. He went on to say:

> It is proved beyond doubt that mosques can and do hold property. There is ample authority for the proposition that a Hindu idol is a juristic person and it seems proper to hold that on the same principle a mosque as an institution should be considered as a juristic person. It was actually so held in 59 P R 1914, p. 200[5] and later in A I R 1926 Lah 372.[6]

That there should be any supposed analogy between the position in law of a building dedicated as a place of prayer for Muslims and the individual deities of the Hindu religion is a matter of some surprise to their Lordships. The question whether a British Indian Court will recognize a mosque as having a locus standi *in judicio* is a question of procedure. In British India the Courts do not follow the Mahomedan law in matters of procedure (*cf.* 7 All 822[7] at pp. 841.2, per Mahmood J.) any more than they apply the Mahomedan criminal law or the ancient Mahomedan rules of evidence. At the same time the procedure of the Courts in applying Hindu or Mahomedan law has to be appropriate to the laws which they apply. Thus the procedure in India takes account necessarily of the polytheistic and other features of the Hindu religion and recognizes certain doctrines of Hindu law as essential thereto, e.g. that an idol may be the owner of property. The procedure of our Courts allows for a suit in the name of an idol or deity though the right of suit is really in the shebait: 31 I A 203.[8]

Very considerable difficulties attend these doctrines — in particular as regards the distinction, if any, proper to be made between the deity and the image : *cf.* 37 Cal 128[9] at p. 153, Golap Chandra Sarkar Sastri's Hindu Law, Edn. 7, pp. 865 *et seq.* But there has never been any doubt that the property of a Hindu religious endowment — including a thakurbari — is subject to the law of limitation : 37 I A 147;[10] 64 I A 203.[11] From these considerations special to Hindu law no general licence can be derived for the invention of fictitious persons. It is as true in law as in other spheres "*entia non sunt multiplicanda praeter necessitatem.*" The decisions recognizing a mosque as a "juristic person" appear to be confined to the Punjab: 153 P R 1884;[12] 59 P R 1914;[5] A I R 1926 Lah 372.[6] In none of these cases was a mosque party to the suit, and in none except perhaps the last is the fictitious personality attributed to the mosque as a matter of decision. But so far as they go these cases support the recognition as a fictitious person of a mosque as an institution — apparently hypostatizing an abstraction. This, as the learned Chief Justice in the present case has pointed out, is very different from conferring personality upon a building so as to deprive it of its character as immovable property.

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[5] Jindu Ram v. Hussain Bakhsh, (1914)1 A I R Lah 444=24 I C 100=59 P R 1914=147 P L R 1914.

[6] Maula Bux v. Hafizuddin, (1926) 13 A I R Lah 372=94 I C 7=27 P L R 256.

[7] Jafri Begum v. Amir Muhammad Khan, (1885) 7 All 822=1885 A W N 248 (F B).

[8] Jagadindranath v. Hemanta Kumari, (1905) 32 Cal 129=31 I A 203=8C W N 809=8 Sar 698 (P C).

[9] Bhupati Nath v. Ram Lal, (1910) 37 Cal 128=3 I C 642=14 C W N 18=10 C L J 355.

It is not necessary in the present case to decide whether in any circumstances or for any purpose a Muslim institution can be regarded in law as a "juristic person." The recognition of an artificial person is not to be justified merely as a ready means of making enactments — well or ill expressed — word conveniently. It does not seem to be required merely to give an extended meaning to the word "person" as it appears in the Punjab Preemption Act,1905, or in the definition of 'gift' contained in S. 122, T.P. Act. It is far from clear that it is required in order that property may be devoted effectively to charitable purposes without the appointment of a trustee in the sense of the English law. It would seem more reasonable to uphold a gift, if made directly to a mosque and not by way of wakf, as having been made to the mutwalli than to do so by inventing an artificial person in addition to the mutwalli (and to God in whom the ownership of the mosque is placed by the theory of the law).

Their Lordships do not understand that in this respect a mosque is thought to be in any unique position according to the authorities on Mahomedan law. "A gift may be made to a mosque or other institution" (Tyabji's Principles of Mahomedan Law, Edn. 2, 1919, page 401, *cf.* Abdul Rahim's Muhammadan Jurisprudence, page 218). A gift can be made to a madrasah in like manner as to a masjid. The right of suit by the mutwalli or other manager or by any person entitled to a benefit (whether individually or as a member of that public or merely in common with certain other persons) seems hitherto to have been found sufficient for the purpose of maintaining Mahomedan endowments. At best the institution is but a *caput mortuum,* and some human agency is always required to take delivery of property and to apply it to the intended purposes. Their Lordships, with all respect to the High Court of Lahore, must not be taken as deciding that a "juristic personality" may be extended for any purpose to Muslim institutions generally or to mosques in particular. On this general question they reserve their opinion; but they think it right to decide the specific question which arises in the present case and hold that suits cannot competently be brought by or against such institutions as artificial persons in the British Indian Courts.

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[10] Damodar Das v. Lakhan Das, (1910) 37 Cal 885=7 I C 240=37 I A 147=14 C W N 889=12 C L J 110(P C).

[11] Iswari Bhubaneshwari Thakurani v. Brojo Nath Dey, (1937) 24 A I R P C 185=168 I C 765=64 I A 203=I L R (1937) 2 Cal 447=31 S L R 538(P C).

[12] Shankar Das v. Said Ahmad, (1884) 153 P R 1884.

The property now in question having been possessed by Sikhs adversely to the waqf and to all interests thereunder for more than 12 years, the right of the mutawalli to possession for the purposes of the waqf came to an end under Art.144, Limitation Act, and the title derived under the dedication from the settlor or wakif became extinct under S.28. The property was no longer for any of the purposes of British Indian Courts, "a property of God by the advantage of it resulting to his creatures." The main contention on the part of the appellants is that the right of any Moslem to use a mosque for purposes of devotion is an individual right like the right to use a private road, 7 All 178,[13] that the infant plaintiffs, though born a hundred years after the building had been possessed by Sikhs, had a right to resort to it for purposes of prayer; that they were not really obstructed in the exercise of their rights till 1935 when the building was demolished; and that in any case in view of their infancy the Limitation Act does not prevent their suing to enforce their individual right to go upon the property. This argument must be rejected. The right of a Muslim worshipper may be regarded as an individual right, but what is the nature of the right? It is not a sort of easement in gross, but an element in the general right of a beneficiary to have the wakf property recovered by its proper custodians and applied to its proper purpose. Such an individual may, if he sues in time, procure the ejectment of a trespasser and have the property delivered into the possession of the mutawalli or of some other person for the purposes of the wakf. As a beneficiary of the religious endowment such a plaintiff can enforce its conditions and obtain the benefits thereunder to which he may be entitled. But if the title conferred by the settlor has come to an end by reason that for the statutory period no one has sued to eject a person possessing adversely to the wakf and every interest thereunder the rights of all beneficiaries have gone: the land cannot be recovered by or for the mutawalli and the terms of the endowment can no longer be enforced: *cf.* 41 Mad 124[14] at p.135. The individual character of the right to go to a mosque for worship matters nothing when the land is no longer wakf and is no ground for holding that a person born long after the property has become irrecoverable can enforce partly or wholly the ancient dedication.

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[13] Jawahra v. Akbar Husain, (1884) 7 All 178=1884 AWN 324 (F B).

This seems to their Lordships a sufficient answer to the argument that the only Article of the Limitation Act which affects the right of the plaintiffs (other than plaintiff 1) is Art. 120. Under that Article any plaintiff who had been of age for more than six years before the date of the suit would be barred as he has clearly been excluded from resort to the building for purposes of prayer. But the true answer to these plaintiffs and to the minor plaintiffs is that the rights of the worshippers stand or fall with the wakf character of the property and do not continue apart from their right to have the property recovered for the wakf and applied to its purposes. As the law stands, notice of the rights of individual beneficiaries does not modify the effect under the Limitation Act of possession adverse to the wakf. Were the law otherwise he effect of limitation upon charitable endowments would be either negligible or absurd. The plaintiffs may, if they choose, refrain from asking that the land be recovered for the wakf but they do not alter the character of their right by deserting the logic of their case.

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[14] Chidambaranatha Thambiran v. Nallasiva Mudaliar, (1918) 5 A I R Mad 464=42 I C 366=41 Mad 124=33 M L J 357.

It remains to say that in the opinion of their Lordships the present suit is concluded on the general principle of res judicata by the decision in the suit of 1855 and also under S.37, Sikh Gurdwaras Act, 1925, by the decision of the tribunal (20th January 1930) rejecting the petition of the Anjuman Islamia. The mere circumstance that the plaintiffs have chosen not to seek recovery of the land in dispute but ask for relief in the forms of declaration and injunction does not avail to enable them to litigate again the claim made by Nur Ahmad as mutawalli to recover the property for the purposes of the wakf. The ground of the decision of 1855 does not affect the question of res judicata. S.37 of the Act of 1925 is as follows:

> Except as provided in this Act no Court shall pass any order or grant any decree or execute wholly or partly, any order or decree, if the effect of such order, decree or execution would be inconsistent with any decision of a tribunal, or any order passed on appeal therefrom, under the provisions of this Part.

It is sufficiently plain that if the present suit were to succeed the effect of the decree would necessarily be inconsistent with the decision of the Tribunal rejecting the petition of the Anjuman Islamia. Unless therefore the case can be brought within the opening words of S.37 — "except as provided in this Act" — that Section is fatal to the claim. Their Lordships are of opinion that the words of the exception have no reference to the provisions of cl. (ii) of S.30 which states the circumstances under which a suit shall be tried notwithstanding that the claim was not put forward before the Tribunal. S.37 assumes that a Civil Court has before it a competent suit in which one party or another would but for the Section be entitled to a certain order or decree, and it provides that such order or decree shall not be made if the effect of it would be inconsistent with any decision of a Tribunal. The words of exception with which S.37 opens are doubtless accounted for by the provisions of S.34 authorizing appeals to the High Court. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the respondents' costs.

D.S./R.K. *Appeal dismissed.*

Solicitors for Appellants — Peake & Co.
Solicitors for Respondents — Charles Russell & Co.

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